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THOMAS TERRY

Plaintiff - Appellant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant - Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

285 I.A. 581

Opinion filed Dec. 27, 1935

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an adverse judgment entered in the Superior Court of Cook County upon the motion of the defendant at the conclusion of the plaintiff's evidence. The action is for damages based upon the "Federal Hours of Service Act," which makes it unlawful for any railroad to permit any employee connected with the movement of any train to remain on duty for a longer period than sixteen consecutive hours. The plaintiff was a laborer employed during the blizzard of March 7, 1931, to clean the snow from the main line and switches on the railroad property, so that interstate trains might proceed. The weather was cold and it was claimed the plaintiff was required and did remain on duty for twenty-two consecutive hours. Both legs were frozen, which resulted in the amputation of one foot and the other leg just below the knee.

The trial court held as a matter of law that the plaintiff was not entitled to recover, and directed a verdict at the close of the plaintiff's case, for the defendant.

A stipulation of facts was agreed on at the trial, and it was agreed that the defendant was a railroad corporation engaged as a carrier for hire and that it maintained the Twelfth Street Station as its passenger terminal in Chicago. The right-of-way extended south along the shore of Lake Michigan from the Twelfth

Opinion filed Dec. 27, 1935

Street Station. In the right-of-way were laid different main tracks, and over these tracks trains were operated by the defendant in interstate commerce.

The plaintiff testified that he commenced work for the defendant company on March 7, 1931, between four and five o'clock in the afternoon. The temperature was around zero. The snow began to fall between 9:00 and 10:00 o'clock in the morning. The men were given shovels and brooms with which to work. The snow was deep and heavy, and the plaintiff shoveled snow from the switches and the tracks and kept the snow from the tracks so that the trains could get through. He worked from the Twelfth Street Station as far south as 31st street. He finished his work at 6:00 o'clock in the evening of March 8, having been in continuous service all that time. There were four or five inches of snow everywhere, and in some places it had drifted from knee-high to waist-high, which had to be shoveled out from the switches and tracks. The tracks on which the plaintiff worked were between the Lake and the suburban lines. The greatest part of the work was done between the suburban and the freight line, where the passenger trains ran. Next to the suburban tracks were two main tracks, being the dispatch tracks from New Orleans to Chicago. It was over these tracks that the through trains ran out of the state and into the state.

The plaintiff further testified that after breakfast at six o'clock A. M. the foreman signed his identification ticket for the thirteen hours he had worked, and told plaintiff he could not get home because the street cars were tied up and if plaintiff needed more work he could go back to the employment office and go to work; that plaintiff went back and stood in line with other men,

Street tracks. In the yards-of-way were half a dozen main tracks, and over these tracks trains were moved by the department in charge of the commerce.

The plaintiff testified that he commenced work for the defendant company on March 7, 1921, being a man of five o'clock in the afternoon. The temperature was around zero. The snow began to fall between 9:30 and 1 o'clock in the morning. The men were given shovels and brooms with which to work. The snow was deep and heavy, and the plaintiff observed snow from the switches and the tracks and that the snow from the tracks so that the trains could get through. He worked from the Twelfth Street Station as far south as 21st street. He finished his work at 6:30 o'clock in the evening of March 8, having been in continuous service all that time. There had been a live inches of snow everywhere, and in some places it was drifted from knee-high to waist-high, which had to be shoveled out from the switches and tracks. The tracks on which the plaintiff worked were between the Lake and the Suburban lines. The greatest part of the work was done between the Suburban and the freight line, where the passenger trains ran. Next to the Suburban tracks were two main tracks, being the diagonal tracks from New Orleans to Chicago. It was over these tracks that the through trains ran out of the state and into the state.

The plaintiff further testified that after breakfast at six o'clock A. M. the foreman signed his identification ticket for the thirteen hours he had worked, and told plaintiff he could not get home because the street cars were tied up and if plaintiff needed more work he could go back to the employment office and go to work; that plaintiff went back and stood in line with other men,

and was finally employed with another gang and was given another red identification ticket; that he had turned in his shovel and broom at six o'clock in the morning, and they were checked in at the tool house at 12th Street; that the second time, he got his shovel and broom at 27th Street; that when he was hired the second time the men working with him were lined up and their feet and clothes examined; that the company furnished sacking to wrap around the feet of those men that did not have boots; that he was already wrapped up and had on rubbers.

Plaintiff continued working until Sunday afternoon, March 8, when he experienced difficulty with his feet. His legs were heavy and he could not continue longer. Two men helped him up the stairs at Cottage Grove Avenue from the yard after which he was put to bed in a hotel and later removed to the hospital where his right leg and left foot were amputated. At the time plaintiff worked for the railroad it was agreed that he was to be paid 57¢ an hour, time and a half.

Plaintiff's claim is based on the Hours of Service Act of March 4, 1907, and is entitled, "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon." The first section of the act is as follows:

> "The provisions of this chapter shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this chapter shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under

and was finally employed with Rubber [illegible] Lien Number [illegible] red identification tickets; he [illegible] several and broom at six o'clock in the morning, [illegible] the tool house at 11th street; [illegible] time, he got his shovel and broom at 27th street; then [illegible] the second time the men working with him were lined up [illegible] their feet and clothes examined; that the company furnished to each [illegible] the feet of those men that did not have rubbers; that he was already wrapped up and had on rubbers.

Plaintiff continued working until [illegible] afternoon, March 8, when he experienced difficulty [illegible] feet. His legs were heavy and he could not continue longer. [illegible] up the stairs at cottage more [illegible] from the [illegible] with [illegible] he was put to bed in a locked [illegible] where his right leg and left foot were [illegible]. At the time plaintiff worked for the railroad [illegible] 57½ an hour, time and a half.

Plaintiff's claim is based on the Act of Congress [illegible] of March 4, 1907, and is entitled, "An Act [illegible] liability of employees and travelers upon railroads [illegible] hours of service of employees thereon." The first section of the act is as follows:

> "The provisions of this act shall apply to any common carrier or carriers, their officers, agents, or receivers, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this chapter shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under

> a contract, agreement, or lease; and the term 'employees' as used in this chapter shall be held to mean persons actually engaged in or connected with the movement of any train."

The second section of the act provided as follows;

> "It shall be unlawful for any common carrier, its officers or agents, subject to this chapter to require or permit any employee subject to this chapter to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

In order that an employee be engaged under the provisions of the Hours of Service Act it must appear that the employee was engaged in interstate transportation and that he was engaged in or connected with the movement of trains. From the evidence, the plaintiff was engaged in maintaining an instrumentality connected with interstate commerce, and, therefore, he himself, was engaged in interstate transportation so as to bring him within the provisions of the Federal Employers' Liability Act. This is admitted by the defendant, and the rule which governs in the matter was announced in the case of I. C. R. R. Co. v. Industrial Commission, 349 Ill. 451, where the court said:

> "At the time of the injury Cardella had been directed to assist in cleaning the switches, frogs and switch-points in order to enable the Chesapeake and Ohio train to be moved in interstate transportation and was proceeding in that employment. The operations involved in clearing those switches were in interstate transportation."

The question here for consideration is whether the evidence is sufficient to establish liability under the "Hours of Service Act." There have been some decisions of courts of appeal upon the question as to when an employee of a railroad is within the classification provided for by this act. The act provides that its provisions shall apply to a common carrier where its officers, agents or employees

> a contract, express or implied, or tort; and it has been held that a person is used in this sense if he is employed by one person, regardless of normally engaged in or connected with the movement of any train."

The second section of the act provides as follows:

> "It shall be unlawful for any common carrier, its officers or agents, subject to this chapter to require or permit any employee subject to this chapter to be on or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of a common carrier shall have been continuously on duty for sixteen hours he shall be relieved or relieve himself and permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

In order to bring employees within the provisions of the Hours of Service Act it must appear that the employees engaged in interstate transportation and that he was employed in or connected with the movement of trains. From the evidence, the plaintiff was engaged in making coupling on instrumentality connected with interstate commerce, and, therefore, actually, he was engaged in interstate transportation. In holding that within the provisions of the Federal employers' liability act, the evidence adduced by the defendant, and the rulings of courts in the cases announced in the case of L. & N. R. R. v. Industrial Commission, 243 Ill. 491, where the court said:

> "At the time of the injury which is complained of, the assist in cleaning the switches, frogs and switch-points in order to enable the locomotive and cars to be moved in interstate transportation and was engaged in that employment. The operations involved in cleaning those switches were in interstate transportation."

The question here for consideration in another and different is sufficient to establish liability under the Hours of Service Act. There have been some decisions of courts of appeal upon the question as to when an employee of a railroad is within the classification provided for by this act. The act provides that its provisions shall apply to a common carrier where its officers, agents or employees

are engaged in the transportation of passengers or property by a railroad operating in the territory described in the act, and the question arising between the parties to this litigation is whether the plaintiff was such an employee as described in the act and was actually engaged in connection with the movement of any train.

It is apparent from a reading of the "Federal Employers' Liability Act", and the "Hours of Service Act", that the intention of Congress was to restrict its provisions to those employees or persons actually engaged in or connected with the movement of trains.

In considering this case two facts must be established in order to justify the Court's submitting the case to a jury. The first one is whether the employee was engaged in the railroad service for the purpose of the movement of any train; and the other one is whether by reason of the number of hours of work performed by the employee, there was a violation of the "Hours of Service Act."

We will take up these two questions in reverse order. Plaintiff was engaged to commence work for the defendant on March 7, 1931, between 4:00 and 5:00 o'clock in the afternoon and he continued such service until 6:00 o'clock of the following morning, having worked thirteen hours in clearing the track and switches of fallen snow. The foreman signed an identification ticket for the thirteen hours, and it appears from the record that the plaintiff having completed that service stood in line with other men for further employment, which is evidenced by the fact that he received another red identification card. After plaintiff completed his work in the morning he turned in his shovel and broom at the tool house at 27th Street, and later he was hired a second time, which would indicate that there was a new employment. The question arises whether by his voluntary act in seeking further employment after he had received an identification card, at six o'clock in the morning,

are engaged in the transportation of persons or property by railroad operating in the Territory of Hawaii, and the question arising between the parties in this action is whether the plaintiff was such an employee as described in the [illegible] actually engaged in connection with the movement of [illegible] by train.

It is apparent from a reading of the [illegible] liability act, and the decisions of [illegible] of Congress was to confer the benefits of [illegible] persons actually engaged in a connection [illegible]

In considering this question [illegible]

In order to justify the jury's [illegible] The first one is whether the employee [illegible] service for the purpose of the movement of [illegible] one is whether by reason of the number [illegible] by the employee, there [illegible] will take up these two questions in the order [illegible]

[illegible] plaintiff was engaged in commerce [illegible] 1921, between [illegible] continued such service until [illegible] having worked thirteen hours in all [illegible] fifteen hours, and it appears from the record [illegible] having completed that service stood in line [illegible] further employment, which is evidenced [illegible] another red identification card. After [illegible] work in the morning he turned in his [illegible] home at 27th Street, and later he was [illegible] would indicate that there was a [illegible] whether by his voluntary act in seeking further [illegible] he had received an identification card, or any other [illegible]

for the thirteen hours' work, he would be within the provisions of this act, provided he was engaged in the service that had to do with the movement of trains. Section 2 of this act provides in part-

> " * * *, whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

I t is evident from the record that plaintiff was not required to render further service, but his act in applying for further work was a voluntary act on his part.

As to whether the railroad company had knowledge of his working, there seems to be nothing in the record to indicate that the agents of the defendant had knowledge and permitted plaintiff to continue work. It might be well to bear in mind in the consideration of the facts that the plaintiff, after he made application the second time for work, stood in line at the employement office from 6:00 A.M. until 8:30 A. M., and received a broom and shovel at 27th Street in the yards of the defendant company. It would seem from the language used in this section of the act that by permitting an individual to work for a longer time than allowed by statute, the defendant must have had knowledge that the person injured was employed for a longer period in violation of the act, and unless there is such knowledge, of course the defendant cannot be charged with having permitted the employee to work in violation of the statute. There is no evidence in the record that plaintiff was permitted to work, with the consent of the defendant, for a longer period than provided for by the statute.

The question as to whether plaintiff was engaged in the service of the railroad company in connection with the movement of any train, is a close one. It is true that plaintiff's work was that of cleaning snow which had fallen for several hours, and in

for the thirteen [illegible] work, [illegible] [illegible] [illegible] [illegible] this act, provided no [illegible] [illegible] [illegible] [illegible] with the movement of trains. [illegible] [illegible] [illegible] [illegible]

> " * * *, whenever any such employee of such carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

I t is evident from the record that [illegible] was not required to render further service, but his act in [illegible] for instance such was a voluntary act on his part.

As to whether the railroad company [illegible] knowledge of his working, there seems to be nothing in the record to indicate that the agents of the defendant had knowledge that [illegible] permitted [illegible] to continue work. It might be well to [illegible] in mind in the consideration of the facts that the plaintiff, after he made up his claim the second time for work, stood in line at the employment office from 6:00 A.M. until 8:30 A. M., and received [illegible] and travel at 27th street in the yards of the defendant company. It could [illegible] from the language used in this section of the [illegible] that by permitting an individual to work for a longer time than allowed by statute, the defendant must have had knowledge that [illegible] employed for a longer period in violation of the act, and [illegible] there is such knowledge, of course the defendant cannot be charged with having permitted the employee to work in violation of the statute. There is no evidence in the record that [illegible] was permitted to work, with the consent of the defendant, for a longer period than provided for by the statute.

The question as to whether [illegible] engaged in the service of the railroad company in connection with the movement of any train, is a close one. It is true that plaintiff's work was that of cleaning snow which had fallen for several hours, and in

cleaning the switches and tracks so the trains could be moved, among them were two main tracks upon which interstate trains moved, although plaintiff did not see any such train during the time he was working.

In the case of Jones v. Louisville & N. R. Co., 209 S. W. 350, the character of such employment was passed upon by the court, which considered several opinions of courts of appeal, in construing the applicability of the Hours of Service Act, and wherein the persons injured were employed in different capacities, and in construing this statute the court said:

> "To hold that an employe, performing duties such as appellant was engaged in at the time he received the injuries complained of, was embraced within the provisions of the Hours of Service Act would, in our opinion, be giving to the act a construction never intended by Congress. The federal courts have not gone so far. For example, they reluctantly held that a yard-master was included, and only did so because a rule of the company stated that yardmasters performed duties pertaining to the movement of trains. A switch tender has been held not to be included in the words 'other employes' in section 2, relating to operators, etc. And in another case the District Court was unwilling to decide whether a man watching an engine was included, but the Circuit Court of Appeals held that such an employe was included because he was, in effect, performing the duties of a fireman, which was said employe's regular occupation.
>
> * * *
>
> We can see no difference between switching movements in the yard and the cleaning of snow from switches. As we understand the work being done by appellant it was not necessary to the movement of through trains, or train movements within the intendment of the act, but was only to keep the switches in such condition in the yard at Shepherdsville that the switches might be used for switching or yard purposes. But for the yard tracks there would have been no more necessity to have cleared these switches than it would have been to keep the snow from every switch on the company's line.
>
> We have found no case holding that a section hand or any one engaged in similar work was included in the act. Were we to so hold, it is difficult to conceive of any employe having outside work for the company who would not be included. The act is not so comprehensive. The reasons leading to its passage we have heretofore given. It was not the intention to give it as wide a scope as the Employers' Liability Act."

The reasoning advanced by the court in its opinion is pertinent, and if Congress had intended to include all employees

observing the switches [illegible] the tracks would be moved, among them were two main tracks upon which interest the trains moved, although plaintiff did not see any such train during the time he was working.

In the case of Jones v. Louisville & N. R. R. Co., 173 Ky. 350, the character of such employment was passed upon by the court, which considered several opinions of courts of record, in construing the applicability of the Act to railroad [illegible], and wherein the persons injured were employed in different [illegible] tion, and in construing this statute the court said:

> "To hold that an employee, occupied [illegible] appellant was engaged in, at the time he received the injuries complained of, was engaged within the provisions of the Act of the House of Lords at work, in our opinion, be giving to the act a construction never intended by Congress. The federal courts have not gone so far. For example, they repudiated [illegible] in Pratt v. [illegible] included, and only held to be covered [illegible] stated that a yardmaster performed duties entitling to the movement of trains. A switch tender has been held not to be included in the words 'employee' in section 5, pertaining to operators, etc. [illegible] case the District Court was [illegible] whether a man watching an engine was included, and the Circuit Court of Appeals held that such an employee was included because he was, in effect, performing the duties of a fireman, which was a [illegible] employee [illegible] construction.
>
> We can see no difference between switching, [illegible] in the yard and the shifting of cars from switches. [illegible] we understand the work being done by plaintiff was not necessary to the movement of trains, or trains movements within the jurisdiction of the act, but [illegible] only to keep the switches in such conditions as to be operable [illegible] switching or yard purposes. But for the yard [illegible] would have been no work necessarily to be done [illegible] switches than it would have been [illegible] every switch on the road [illegible] line.
>
> We have found no case holding that a section hand or any one engaged in similar work was included in the act. Here we to so hold, it is [illegible] employee of any employer having outside work for the company who would not be included. The act is not so comprehensive. The reason leading to its passage we have mentioned, [illegible] not the intention to give it so wide a scope as the employers' liability act."

The reasoning advanced by the court in its opinion is pertinent, and if Congress was intended to include all employees

engaged in railroad work, it would not have limited this section to employees defined in the act "to mean persons actually engaged in or connected with the movement of any train." It is the duty of a section-hand to look after the rails of a road over which the trains run, and see that the rails are secure and fastened so that the trains may operate, but, as we have indicated, he is not engaged in a service which has to do with the operation of trains, and therefore does not come within the provisions of the "Hours of Service Act." In the instant case plaintiff was not engaged in a service which would come within the provisions of this act, and for the reasons stated, we believe the court below did not err in instructing the jury to find the defendant not guilty, and therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P. J. AND DENIS E. SULLIVAN, J. CONCUR.

engaged in a livelihood work, it may be argued that section to employers defined in the act "to mean persons actually employed in or connected with the movement of any train," at the time duty of a switch-hand to hold water the rails of a road over which the trains run, and see that the rails are secure and fastened so that the trains may operate, but, as we have indicated, he is not engaged in a service which has to do with the operation of trains, and therefore does not come within the provisions of the "Hours of Service Act." In the instant case, a fireman was not engaged in a service which would come within the provisions of this act, and for the reasons stated, we believe the court below did not err in instructing the jury to find the defendant not guilty, and therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

HAND, P. J., AND DRIS S. SOLIVAN, J., CONCUR.

38612

CHARLES V. FALKENBERG,
Appellee,

vs.

ROBERT P. GUST,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

285 I.A. 581

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment on default for $1746.54.

The return on the summons recites that it was served on "a person of (defendant's) family" on August 15, 1935; August 26th an order was entered defaulting defendant for failure to appear; August 29th, by leave of court, defendant filed a special appearance for the purpose of moving to quash the service of summons; this motion was overruled and judgment was entered. The motion to quash was supported by defendant's affidavit to the effect that at the time of the alleged service of summons on him he was a resident of New York City and that the person at his old address in Chicago upon whom service was had was a lessee of the premises, an entire stranger, not related to him in any way and not in his employ.

The defendant in this court does not question the rulings of the trial court upon the motion to quash the service of summons, and the proceedings in this connection are important only as tending to explain defendant's failure to appear. On September 5th defendant filed a petition to vacate the judgment, which motion was denied.

The statement of claim alleges an obligation upon the defendant as guarantor by virtue of a certain note and agreement dated July 15, 1932; on this date LeMaire, Inc., executed a promissory note by Robert P. Gust, vice-president, wherein it promised to pay to the order of H. J. Fischer, agent for G. M. Fischer, $2934.80, in installments; simultaneously with the execution of the note there was executed and delivered an agreement between Harvey J. Fischer, G. M. Fischer, Robert P. Gust, LeMaire, Inc.,

and other parties; it purports to contain terms and conditions under which these parties are to adjust accounts and differences between them. Paragraph 13 provides that the note of LeMaire, Inc., for $2934.80 shall be paid "out of the income or profits or assets of LeMaire, Inc., at the rate of fifty dollars per week," and the defendant, Gust, agrees to advance said note payments each week "if funds of LeMaire, Inc., are not available therefor." It is under this provision in the contract that plaintiff asserts defendant is liable as guarantor.

The defense presented is that by certain provisions of this agreement H. J. Fischer, the payee in the note, was to do certain things which he has failed to do, hence the plaintiff cannot recover on this agreement and note. Paragraph 12 of the agreement provides that LeMaire, Inc., issued its note in payment of merchandise, certain established business, supplies and new formulas sold and delivered to LeMaire, Inc., by G. E. Fischer and H. J. Fischer. Paragraph 14 lists the property to be delivered as toilet preparations, trade marks, books, materials, formulas and all machinery and equipment used in preparing such toilet preparations. The statement of claim does not allege any performance by Fischer of his obligation in this respect. Defendant's petition to vacate asserted that none of this property had been delivered.

The rule has been stated in many cases that plaintiff can not recover on an agreement unless he has executed his obligations under the agreement. Stephany v. Gaston, 163 Ill. 53; City of Peoria v. Construction Co., 169 Ill. 36; Armstrong F. and V. Mfg. v. Continental Can Co., 220 Ill. App. 90. In the last case cited the court, quoting from Consumers Nat. Oil Co. v. Western Petroleum Co., 216 Ill. App. 382, said it is "a legal axiom that he who has first breached a contract cannot maintain an action for damages against the other party thereto for a failure to further proceed to

and other matters; it purports to [illegible] under [illegible] under which these parties [illegible] between them. Paragraph 13 of [illegible] for $[illegible] and "[illegible] of the income or profits or assets of [illegible], Inc., at [illegible] defendants [illegible] "if [illegible] of [illegible], Inc., [illegible] will [illegible]." It is under this provision in the contract that plaintiff asserts jurisdiction in Illinois on [illegible].

The defendants [illegible] agreement [illegible] of this agreement [illegible] certain things which he was [illegible] on this agreement [illegible] that [illegible], Inc., [illegible] certain [illegible] delivered to [illegible], Inc., [illegible] trade marks, [illegible] marks used in [illegible]. The [illegible] of claim does not [illegible] in this respect. [illegible] of this property [illegible].

The rule [illegible] not recover on [illegible] under the agreement. [illegible] Fuerth v. [illegible] v. [illegible] the court, [illegible] first presented a contract [illegible] against the other party [illegible] proceed to

carry out such contract subsequent to such breach."

It also should be noted that there is no liability upon the defendant, Gust, to advance any money on account of the note signed by LeMaire, Inc., unless "funds of LeMaire, Inc., are not available."

Plaintiff says that for a valuable consideration, before maturity, the note was indorsed and sold and delivered to him and that he is now the legal owner and holder. The note itself imposes no obligation on defendant; he is not a party to it. Whatever obligation there may be on the defendant is by virtue of the provision in the agreement that defendant will advance payments on the note if the funds of the maker, LeMaire, Inc., are not available. But plaintiff is not a party to the agreement and has no interest in it. This undertaking of defendant in this agreement apparently runs to Fischer. We know of no rule that will sustain an action for enforcement of a contract by one not a party to it and without interest in it. Nor can an action be based on one provision of a contract excluding the other provisions.

We hold that the trial court should have vacated the judgment, permitting the petition to vacate to stand as the affidavit of merits. The judgment is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

carry out such contract [illegible] ."

It also should be noted that [illegible] a loan the defendant, Guar, to [illegible] of the note signed by Lumaire, Inc., [illegible] , is not available."

Similarly [illegible] , Lumaire, before maturity, the note was [illegible] that as to [illegible] the [illegible] insurance no obligation on [illegible] it. [illegible] of-ligation there may be on the [illegible] by virtue of the provision in the agreement that [illegible] on the note if the funds of the [illegible] , [illegible] , [illegible] not available. But plainly is not a [illegible] in it. This materiality of [illegible] certainly runs to Kimmer. We know of no rule in [illegible] action for enforcement of a contract or [illegible] part, in it and without interest in it. Nor can [illegible] based on the rescission of a contract excluding the other provision.

We hold that the [illegible] , [illegible] permitting the petition to [illegible] of merits. The judgment is therefore [illegible] is remanded.

[illegible]

Hatchett and [illegible] , [illegible] .

38672

LILLIAN KAY,
Appellee,

vs.

MEYER ROTHSCHILD and MRS. MEYER ROTHSCHILD,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

285 I.A. 581

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was engaged by defendants for general house work, including laundry work; while operating the electrically propelled laundry wringer her left hand was caught between the rollers and this suit is for the resulting injuries; upon trial she had a verdict for $3000; the court suggested that plaintiff remit $1500; this was done and judgment for $1500 was entered, from which defendants appeal.

In her declaration plaintiff alleged that the electric washing machine wringer was old, worn-out, defective, unsafe, dangerous and insecure; there is no contention as to construction. Plaintiff testified as to her employment by defendants at their home on Ellis avenue, Chicago, on the Sunday afternoon of October 29, 1933; she told Mrs. Rothschild that she was experienced in general house and laundry work; she was told of the electric wringer in the laundry. Plaintiff testified that she was familiar with this type of wringer; she reported for work on Monday but did not do any laundry work until the following day. A Miss Mena Richards was also employed as a servant by defendants, and plaintiff says Miss Richards showed her where the laundry was.

Plaintiff says that on Tuesday morning she went down to the basement where the laundry was located and built a fire in a little coal stove to heat the water to be used in washing the clothes; she started the wringer and after she had washed a couple of tubs full of clothing the wringer suddenly stopped; she worked the lever

used to start and stop the wringer, but without effect; she says she worked fifteen or twenty minutes trying to get the wringer to go, working the lever backward and forward; that there was no congestion of clothes in the wringer and no cause as far as she knew for its stopping; she went upstairs to the kitchen and told Mrs. Rothschild and the other maid, Zena Richards, that the wringer had stopped and would not go; that Mrs. Rothschild said there couldn't be anything wrong with the wringer, that it was in perfect condition; that the witness, with Miss Richards, then went back to the laundry and Miss Richards moved the lever of the wringer back and forth and it finally started; plaintiff then continued with the washing and says that she started to put a sheet through the wringer; that the sheet was bunched and the wringer stopped; that she started to straighten out the sheet so it would not go through in a thick bunch, and that just as she was in the act of smoothing the sheet the wringer suddenly started and her left hand was drawn in between the rollers; that she tried to reach the lever to stop the wringer but was unable to do so for some fifteen or twenty minutes, as the lever was somewhat out of reach. She says that while her hand was between the rollers the upper roller kept moving while the lower roller was stationary. After she extracted her hand she went upstairs and told Miss Richards of her accident. She was taken to a doctor and received treatment.

In a number of important respects her testimony was contradicted by other witnesses. Although plaintiff said she understood how to operate the wringer and needed no instructions, Zena Richards testified that on Tuesday morning of the accident she went to the basement with plaintiff and showed her how to operate the wringer; showed her the control box at the right side of the wringer and how to turn the lever to start the rollers or to stop them or to put them in reverse. Miss Richards also testified that she ex-

[illegible] need to start and stop the [illegible]. [illegible] a
one worked fifteen or twenty minutes [illegible] to
do, working the lever [illegible]
[illegible] a of chance in [illegible] are [illegible]
for life stopping; [illegible]
Notwithstanding the [illegible]
stopped and [illegible]
be anything wrong [illegible]
that the witness, [illegible]
and Miss Gilcrista [illegible]
and it finally started; [illegible]
and says that she [illegible]
the street was [illegible]
straightened out the [illegible]
[illegible], and that just [illegible]
the witness [illegible]
the railers; that [illegible]
but was unable to do so for [illegible]
lever was somewhat out of [illegible]
between the railers the [illegible]
railer was [illegible]
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In a number of [illegible] was [illegible]
dicted by other witnesses. [illegible]
how to operate the [illegible]
testified that on Tuesday [illegible]
[illegible] with plaintiff [illegible]
showed her the course [illegible]
how to turn the lever to start the [illegible]
put them in reverse. Miss [illegible]

plained to plaintiff the operation of the safety release bar on top of the wringer which would, by touching it, release the rollers in case of emergency. Plaintiff testified that she knew about this safety device but forgot about it when her hand caught. Plaintiff was apparently mistaken about building a fire in a coal stove in the basement to heat the water, as it is not disputed that there was no coal stove in the laundry and that hot water for laundry work is drawn from a pipe connecting with a boiler. Persons using the laundry did not use any fire.

Miss Richards testified that after she took plaintiff down to the basement and explained the operation of the wringer she did not see her again until between 11:30 and 12 o'clock in the morning when plaintiff appeared at the back door, saying her hand had caught in the wringer. Both Mrs. Rothschild and Miss Richards testified positively that plaintiff did not at any time say there was anything wrong with the wringer. Mrs. Rothschild says she was not at home that morning and knew nothing about the accident until she returned in the evening. Miss Richards testified, denying "positively" that plaintiff prior to the accident complained that the wringer had stopped and that she went to the basement and assisted plaintiff in starting it.

A Mrs. Lowitz, a daughter of defendants, had gone with her mother down town a little after nine o'clock a. m., but returned alone about twelve o'clock noon. She saw Zena Richards trying to locate a doctor for plaintiff. Mrs. Lowitz asked plaintiff how the accident happened and plaintiff said there was a piece of lace winding itself around the wringer and she was trying to pull it out, as she thought it might tear, and in so doing her hand caught. Zena Richards testified that she heard this conversation and heard plaintiff say that she was trying to remove a small piece of lace, or something, that got caught around the roller, and in trying to

[illegible]

[illegible] of the witnesses - [illegible] and, by [illegible] case of emergency. [illegible] safety valve [illegible] was economically [illegible] the basement [illegible] was no [illegible] work is [illegible] the laundry [illegible].

[illegible] to the [illegible] not see [illegible] when [illegible] in the window. [illegible] positively that [illegible] wrong with the window. [illegible] that morning, and knew nothing about the accident [illegible] in the evening. [illegible] plaintiff prior to the accident [illegible] stopped and that she went [illegible] starting it.

A Mrs. Lewis, [illegible] mother down town a little after nine [illegible] alone about twelve [illegible] locate a doctor for plaintiff. Mrs. Lewis [illegible] accident happened and [illegible] winding itself around her [illegible] out, as she thought it [illegible] Zena Hitchcock testified [illegible] plaintiff say that she was trying to [illegible] or something, that her weight [illegible] trying to

removes it her hand got caught in the wringer.

There was evidence that the wringer was about two years old at the time of the accident and the sellers "serviced" this machine at least every six months. Stephen Douglas testified that he did this work for the manufacturers of the machine; that a few weeks before the accident he made an inspection of defendants' machine, going over it entirely, operating it, checking it for proper operation, going over it generally to see that there were no loose connections. He testified that on that occasion he spent approximately an hour inspecting the machine and found no mechanical defect in it of any nature. The witness described the wringer as mechanically connected to the motor with a belt. He testified as to the safety bar or device at the top of the wringer which, when pushed, immediately releases the tension of the rollers. It is a friction drive wringer; that is, the power is applied to the lower roller and the upper roller turns by friction against the lower roller; the upper roller cannot operate when the lower roller is not turning. This seems to negative plaintiff's testimony that when her hand was caught the upper roller was moving by itself while the lower roller seemed stationary. Douglas further testified that it would be mechanically impossible for the machine to stop for fifteen or twenty minutes with electric power turned on and then to start again; that if the machine stopped for that length of time with the power turned on it would burn out the motor or fuse; it would not start of its own accord. The court asked whether putting a large quilt or sheet in the wringer might stall it, to which witness replied that this was possible but hardly likely.

Defendants argue that plaintiff has not proved the specific defect in the wringer which caused it to stop, citing Goldie v. Werner, 151 Ill. 551. In that case a scaffolding fell; plaintiff was held to have proven the defect alleged by showing that one

of the joists was knotty and not properly nailed or braced. In Smythe v. Parish & Co., 140 Ill. App. 405, plaintiff's hand was caught between upper and lower dies; there was evidence that the machine operated defectively; it was argued that plaintiff had not proven the particular flaw or imperfection which caused the improper working of the machine. The court said it was sufficient to prove that it improperly operated, citing Nat. Enameling & Stamping Co. v. Kinder, 126 Ill. App. 642, and Mallen v. Waldowski, 101 Ill. App. 367. See also Muenter v. Moline Plow Co., 193 Ill. App. 261, and Goddard v. Engler, 123 Ill. App. 108.

In these cases it is held that where evidence of defective operation makes a prima facie case of a defective machine, to impose liability on the employer it must be proven that he had previous notice of such defective operation or should have known it. Applying this rule to the instant case, plaintiff's testimony that the wringer suddenly stopped operating for fifteen or twenty minutes or more and then suddenly started again might be said to make a prima facie case of defective machinery, although the testimony of Douglas that this would be mechanically impossible casts much doubt on plaintiff's testimony in this respect.

However, we are of the opinion that the greater weight of the evidence is against plaintiff's claim that she notified Mrs. Rothschild of the alleged defect in the wringer before the happening of the accident. Mrs. Rothschild's testimony, supported by that of her daughter, Mrs. Lowitz, tends to show that Mrs. Rothschild was not home at the time plaintiff says she told her of the stopping of the wringer. Zena Richards directly contradicts plaintiff's testimony as to this incident. The testimony of these witnesses, in connection with the testimony of Douglas, to which we have referred, negatives plaintiff's story as to notice of any defect in

the wringer. We are well aware that this is a question of fact properly to be submitted to the jury, but when its verdict is manifestly against the weight of the evidence it is our duty to so hold.

Plaintiff's own story leads almost irresistably to the conclusion that as she placed a sheet in the wringer it became bunched up so as to retard the act of passing between the rollers, and while she was attempting to smooth out this bunch inadvertently her fingers were caught between the rollers. In this connection we cannot understand, if, as plaintiff says, she was thoroughly familiar with the mechanics of the wringer, why she did not immediately with the other hand touch the safety bar, which would release the tension of the rollers and permit the withdrawal of the hand with probably slight injury. It might be said that it is universally known that a clothes wringer of this type is hazardous to the operator. The danger that the fingers may be drawn between the rollers is open and apparent, and great caution and carefulness must be used to avoid this. There is force in the suggestion that plaintiff was not as familiar with this type of wringer as she represented herself to be, and that the accident happened because of lack of that degree of caution which experience would teach must be used to avoid accident.

The verdict of the jury was for $3000, from which plaintiff at the suggestion of the court remitted $1500. This lends support to the point that the verdict of the jury was largely the result of passion and prejudice. The evidence as to the extent of the injury would not justify the amount of the verdict returned.

Counsel for defendants earnestly argues that errors were committed by the trial court in his rulings and instructions to the jury. We are inclined to think the court was justified in admonishing counsel as to the necessity of occupying less time in examination

the winger. We are well aware [illegible] properly to be admitted in the jury, [illegible] to verify in manifestly against the weight of the evidence [illegible] so hold.

Plaintiff's own story leaves [illegible] conclusion that he was injured [illegible] bumped up to or to retard the car [illegible] roller, and while she was attempting to [illegible] inadvertently her finger was caught between the roller. In this connection we cannot overlook, [illegible] was thoroughly familiar with the mechanics of the [illegible] did not immediately with the other [illegible] would relieve the tension of the rollers and prevent the injured of the hand with probably slight injury. It [illegible] is universally known that a diverse [illegible] hazardous to the operator. The [illegible] drawn between the rollers to open and [illegible] and carelessness must be used to avoid [illegible] suggestion that plaintiff was not so familiar [illegible] winger as she represented herself to be, [illegible] happened because of lack of [illegible] experience would soon want be used to [illegible].

The verdict of the jury was [illegible] tiff at the suggestion of the court to [illegible] support to the point that the verdict [illegible] result of passion and prejudice. The evidence [illegible] the injury could not justify the amount of the [illegible] tendered.

Counsel for defendants earnestly [illegible] errors were committed by the trial court in its rulings and [illegible] to the jury. We are inclined to think the court [illegible] in admonishing counsel as to the necessity of [illegible] in argument

of witnesses, and there was no reversible error in connection with the instructions.

The trial court properly refused to give the special interrogatory requested by defendants. The interrogatory joined a number of questions, to which the jury might make different answers. Such interrogatories must be single and direct. Wolff Mfg. Co. v. Wilson, 152 Ill. 9; Hicks v. Cuneo-Henneberry Co., 319 Ill. 344; Vos v. Franke, 202 Ill. App. 133.

It is unnecessary to note other errors said to have occurred upon the trial as those will not likely occur again.

Evidence as to the condition of the wringer after the accident would have been of paramount value. No such evidence was introduced. Where it is shown that a machine has not been changed, evidence of its condition after an accident is admissible. Black v. Harris, 200 Ill. 96; Muenter v. Moline Plow Co., 193 Ill. App. 261.

For the reason that the verdict is against the manifest weight of the evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

of witnesses, and there was no reasonable error in connection with the instructions.

The trial court properly refused to [illegible] several interrogatory requested by defendants. [illegible] a number of questions, to which the jury [illegible] answers. Even interrogatories must be [illegible] [illegible] 318 Ill. 244; [illegible] v. [illegible], [illegible].

It is unnecessary to [illegible] [illegible] entered upon the trial as [illegible].

Whether or not [illegible] either a mid-term decision of [illegible] introduced. Where it is [illegible] evidence of its condition [illegible] v. Harris, 300 Ill. 56; [illegible], 193 Ill. [illegible] 521.

For the reasons [illegible] verdict or the evidence, the judgment is reversed [illegible] remanded.

[illegible]

Matchett and O'Connor, JJ., concur.

38733

VILLAGE OF RIVER FOREST, Appellee,

vs.

GEORGE S. FORBES, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I A. 531

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from defendant his alleged share of certain expenses incurred by the Village in connection with the special assessment for paving Harlem avenue; defendant filed a counterclaim to recover back certain sums which he had paid to plaintiff on account of these expenses; on trial by the court the finding was for plaintiff and against defendant on his counterclaim and judgment was entered against defendant for $1050, from which he appeals. A mere recital of the facts demonstrates that the conclusion of the trial court was justified.

In 1932 plaintiff passed an ordinance providing for the paving of Harlem avenue and the levying of special assessments to pay for this, resulting in the confirmation of an assessment against the property of defendant in the sum of $10,697; defendant appealed from that judgment to the Supreme court, which appeal was dismissed. Apparently defendant attempted to find some way to avoid payment of this judgment; to this end he entered into negotiations with the County of Cook seeking to have it pave Harlem avenue at its own expense, but in this he was unsuccessful; defendant then negotiated with the Highway Department of the State of Illinois, seeking to have the pavement of Harlem avenue made by the State at its expense; as a result of these negotiations the Highway Department agreed to make said improvement at its own expense provided this was agreeable to the trustees of the Village, and to any contractors with whom the Village had entered into contracts for the making of this improvement.

seeking

Defendant then sought to induce the trustees of the Village to consent to have the improvement on Harlem avenue made by the State of Illinois; at this time the assessment role showed assessments against properties of five parties, including the assessment of $10,697 against defendant's property. June 9, 1933, defendant submitted to the Village a proposition in writing in which he stated he herewith gave his check for $100.26 in connection with the special assessment for paving Harlem avenue, and he agreed to pay to the Village on or before the first day of each month the sum of $150 until the sum of $1500 has been paid; the letter recited that the total of $1600.26 represents the amount which defendant had computed as due from him as the owner of the property on Harlem avenue; it also stated that the payments made by defendant should be held by the attorney for the Village in escrow, and that when the total amount of $1600.26 has been paid, "you will vacate the above special assessment and discharge as a lien of record the above special assessment." The letter continues:

"I understand that upon receipt of this letter, you will immediately undertake to obtain from the following owners, the amount set opposite their respective names and that it will require the payment of the following amounts to completely discharge the above assessment proceeding:

Forest Preserve.....	750'	$1,346.28
Goelitz.....	206.5'	370.69
Marrott.....	213'	382.36
Bowman Dairy.....	217'	389.54

Should you find that you are not able to obtain the payment of the above amounts from the above owners, either in cash or in obligations or Agreements that you shall decide to accept, that you will return to me all payments which I may have made under this Agreement."

This letter was signed by defendant. Upon receipt of this proposal the officials of the Village accepted it, and thereupon, with the consent of the contractors, cancelled all outstanding contracts for work in connection with this improvement and advised the State of Illinois that it had no objection to its proceeding with the improvement.

[illegible]

to commence in [illegible]

State of Illinois; [illegible]

[illegible]

of 10,000 [illegible]

[illegible]

[illegible]

the [illegible]

pay to the Illinois [illegible]

of $[illegible] [illegible]

that the total of $250.00 [illegible]

had commenced on the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

record the above [illegible]

"I [illegible]

immediately undertake to [illegible]

amount not exceeds [illegible]

the payment of the [illegible]

[illegible]

Forest [illegible]

[illegible]

[illegible]

[illegible]

Should you find that you [illegible]

above amounts from [illegible]

[illegible]

return to me all [illegible]

work."

This letter [illegible]

proposal the [illegible]

with the [illegible]

[illegible]

the State of Illinois [illegible]

with the improvement.

It was stipulated that the Village had incurred certain expenses in connection with this improvement and had issued its vouchers to certain parties, including a paving company which had commenced a portion of the preliminary work. The schedule of payments contained in the letter of defendant is based upon the amount necessary to reimburse the Village for its expenses in this connection. By the enterprise of defendant he had thus reduced the amount of his assessment from $10,697 to $1600.26. By his defense in the present action he seeks to avoid payment of any amount.

After the acceptance of defendant's proposal the Village proceeded to and did collect from all the parties named in the letter the amount due from them, except from Goelitz, which sum, amounting to $370.69, Goelitz refused to pay. It was stipulated that the Village was ready, willing and able to vacate the special assessment proceedings and discharge it as a lien of record upon defendant's property upon the payment by him of the balance due under his proposal, namely, $1050, and that no certificate of completion or of acceptance has been filed in the special assessment proceeding.

Defendant argues that his promise to pay was conditioned on plaintiff collecting from all the persons named in his letter the amount set respectively after their names; that they have not collected from Goelitz, hence, it is said, plaintiff has not performed the condition upon which defendant promised to pay. To this plaintiff replies that the condition imposed upon it in defendant's letter was to obtain the payment of the amount set forth "from the above owners, either in cash or in obligations or agreements that you (the Village) shall decide to accept." Plaintiff admits that it has not secured cash or an agreement to pay $370.69 from Goelitz, but says that it has an enforceable obligation against him arising under the special assessment proceeding which is still

It was alleged [illegible] expenses in connection with this [illegible] the voucher to certain [illegible] had accounted a portion [illegible] payments contained in the letter [illegible] amount necessary to [illegible] connection. By the [illegible] amount of his assessment from [illegible] in the present action [illegible] paid [illegible].

After the examination of [illegible] proceeded to [illegible] letter the [illegible] amounting to $470.00, [illegible] that the Village was ready, [illegible] assessment proceeds, [illegible] defendant's property [illegible] under his process, namely, [illegible] plaintiff or of account was [illegible] proceeding.

Defendant urges that his [illegible] plaintiff collecting from his [illegible] amount set respectively after [illegible] located from Quality, Ltd. [illegible] the condition upon which defendant [illegible] tiff replies that [illegible] ter was to obtain the [illegible] above course, either in [illegible] you (the Village) small [illegible] it was not secured [illegible] Quality, but says that it [illegible] arising under the special [illegible]

pending; that the Village has a lien upon the property of Goelitz which is a valid and enforceable obligation against it, and the Village officials have decided to accept this obligation in accordance with the terms of defendant's letter.

Both counsel say that the State of Illinois has completed the improvement contemplated by the ordinance providing for the pavement of Harlem avenue, and defendant says that under such circumstances plaintiff has no enforceable obligation against the property of Goelitz, because before the property can be classed as delinquent and sold for non-payment of any installment of a special assessment it is necessary for the Village to file a certificate of cost and completion, which, defendant says, the Village cannot do as there was no cost to it, the work having been done by the State. We think the position of plaintiff is correct when it says that the improvement has not been abandoned, that there has been merely a substitution of the State as the agency doing the work instead of private contractors; that there is nothing to prevent plaintiff from filing a certificate of cost and completion and asking for an abatement of the assessment against the property of Goelitz in excess of the amount actually expended by the Village in connection with the work.

We see no substantial reason why defendant should not pay the amount as outlined in his proposal. The Village has agreed, upon defendant's making this payment, to vacate the special assessment and discharge it as a lien of record upon his property. He would thus obtain exactly what he bargained for.

Some argument is made as to the rulings of the trial court upon propositions of law submitted, but nothing specific is indicated. In any event, it is unnecessary for us to consider propositions of law if the judgment of the Municipal court from which the appeal is taken is correct. North Chicago City Ry. Co. v.

4

ponding; that [illegible] of [illegible] wide. It is a valid and [illegible] [illegible] Village [illegible] [illegible] [illegible]

Town of Lake View, 105 Ill. 207; Weber v. Krueger, 202 Ill. App. 57; Hoffman v. Sears-Community State Bank, (Abst.) 269 Ill. App. 644. Moreover, propositions of law are not necessary under the present statute. Ill. State Bar Stats. 1935, par. 192, chap. 110.

We find no reason to disagree with the finding of the trial court and its judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Town of Lake View, 104 Ill. App. 27; [illegible]

Collins v. Metro-Goldwyn [illegible]

McGrory, supra [illegible]

Mantle, 111. [illegible]

We find no [illegible]

trial court and its judgment [illegible]

Mitchell and Lindner, [illegible]

38631

HANS BENTSEN, Administrator of the Estate of Nettie Bentsen, Deceased,
Appellee,

vs.

WILLIAM C. PANZER and FREDERICK C. PANZER,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

285 I.A. 582

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case plaintiff as administrator filed a declaration in three counts charging defendants with general negligence, excessive speed and wilful and wanton negligence, resulting in the death of plaintiff's intestate, Nettie Bentsen. In each of the counts it was charged that defendants "possessed, owned, controlled and by themselves, their agents and servants were driving a certain automobile," etc. The wanton and wilful count was withdrawn. Defendants entered a plea of not guilty. There was a trial by jury and a verdict for plaintiff for $7500 against both defendants, upon which the court, overruling motions for a new trial and in arrest, entered judgment. Defendants ask us to reverse this judgment.

It is urged for reversal that there was a total absence of proof of ownership, operation or control by defendants as charged in the declaration; that the court erred in permitting improper evidence over the objection of defendants and in refusing to include in its instructions to the jury certain suggestions tendered by defendants.

The evidence tends to show that March 23, 1932, plaintiff's intestate, Nettie Bentsen, died as a result of injuries sustained by her December 27, 1931, at the intersection of Long avenue and Henderson street in the city of Chicago. Long avenue is a public highway extending north and south, and Henderson street a public highway extending east and west. At the time of the accident Nettie

38631

[illegible]
Estate of Nettie [illegible], Deceased,
[illegible],

vs.

WILLIAM C. [illegible]
PARKER,
[illegible].

[illegible]

In an action of [illegible] a declaration in trover counts [illegible] negligence, excessive speed [illegible] auling [illegible] the death of [illegible] each of the counts [illegible] owned, controlled and by [illegible] were driving a certain automobile, [illegible] count was [illegible]. There was a trial by jury [illegible] against both defendants, [illegible] for a new trial and in arrest, [illegible] us to reverse the judgment.

It is urged for reversal [illegible] proof of own racing, operation [illegible] in the declaration; that the court [illegible] evidence over the objection of [illegible] clude in its instructions [illegible] by defendants.

The evidence tends to [illegible] intestate, Nettie [illegible] by her December 27, 1931, [illegible] Henderson street in the city [illegible] highway extending north and south, [illegible] highway extending east and west. [illegible]

Bentsen was riding with her husband who was driving an Oldsmobile automobile in a westerly direction on Henderson street. The Oldsmobile was struck by a Buick owned by defendant, William C. Panzer, and driven by his son, defendant Frederick C. Panzer, who was driving in a northerly direction on Long avenue. The collision occurred between two and three o'clock a. m. Nettie Bentsen and her husband had been visiting at the home of a friend, who resided on Henderson street about a block and a half east of Long avenue. The evidence tends to show that as they approached the intersection they stopped and then proceeded to cross at a moderate speed; that the Buick meanwhile approached the intersection coming from the south and struck the Oldsmobile in which deceased was riding when it was just past the middle of the intersection. The damage sustained by the Buick tends to corroborate testimony submitted by plaintiff to the effect that defendants' automobile was being driven at a very great rate of speed. The verdict of the jury was that defendants were guilty of negligence, and it is not argued that the verdict is against the weight of the evidence. The evidence shows that the Buick was owned by defendant William C. Panzer, but was driven by his son Frederick, who was then 18 years of age and a student at the Lake Forest University. The father was not an occupant of the automobile and was not present at the time of the collision. The son lived at home at 5324 Warner avenue, and on the evening of December 26, 1931, attended a Christmas party at the home of a Mrs. Schultz, 3244 North Long avenue; the party was one where relatives and friends gathered. Apparently Frederick Panzer drove the Buick to the home of Mrs. Schultz, although the evidence is not definite in this respect. The car was parked in the street by the curb in front of the Schultz home, and early in the morning Frederick with a companion, Frederic T. Stolley (a brother of Mrs. Schultz, who was 22

Bertram was riding with her husband [illegible] automobile in a westerly direction [illegible] mobile was struck by a [illegible] and driven by his son, Defendant Frederick [illegible] ing in a northerly direction [illegible] between two and three o'clock [illegible] had been waiting at the [illegible] street about a block and a half [illegible] tends to show that [illegible] and then proceeded to cross [illegible] meanwhile approached the intersection [illegible] struck the Oldsmobile in such [illegible] just past the middle of the intersection. [illegible] the Buick tends to corroborate [illegible] the effect that defendant's automobile was [illegible] great rate of speed. The verdict of the jury [illegible] were guilty of negligence, and it is [illegible] against the weight of the evidence. [illegible] Buick was owned by defendant [illegible] his son Frederick, who was [illegible] Duke Forest University. [illegible] mobile was not present at [illegible] lived at home at 3321 [illegible] 26, 1931, attended a Christmas [illegible] 3244 North Long avenue, [illegible] gathered. Apparently Frederick [illegible] of Mrs. Schultz, either [illegible] respect. The car was parked in the street [illegible] the Schultz home, and early in the morning [illegible] pension, Frederic T. Stolley is brother of Mrs. Schultz, who was 22

years of age and lived at 3731 Eddy street) came out of the home and got into the car with Frederick Panzer, who then drove the car north on Long avenue.

Robert Wesche, who with a Miss McKanz, his brother Carl and a Mr. Cady, also attended this party, left at the same time in an automobile which followed the Panzer car north on Long avenue until the collision occurred. Other than as above recited, there is no evidence tending to show by whose direction, or with whose permission, or for what purpose the car was being driven. William C. Panzer did not testify in the case.

Defendant argues that the court erred in permitting evidence to be received as to certain skid marks on the road at the scene of the accident and cites Billingsby v. Gulick, 252 Mich. 235, 233 N. W. 235; Marine v. Stewart, 165 Md. 698, 168 Atl. 891; Johnson v. C. & A. R. R. Co., 193 Ill. App. 632; Merchants Loan & Trust Co., v. Boucher, 115 Ill. App. 101. We entertain no doubt that upon laying the proper foundation, evidence as to skid marks is competent in a case of this nature. Briley v. Nussbaum, 252 Pac. 223; Vedder v. Bireley, 267 Pac. 724. Indeed, evidence as to these skid marks was given by defendant, and much of this evidence offered by plaintiff was received without objection by defendants, who cross-examined on it at length. We hold there was no reversible error in this respect.

It is argued the court erred in refusing to give defendants' suggested instructions Nos. 1, 5, 6, 7, 8, 9 and 10. At the time of the trial section 67 of the Civil Practice act, since repealed (Ill. State Bar Stats. 1935, chap. 110, p. 2447) was in force. It provided, in substance, that instructions by the court should be given only as to the law of the case, be in writing, in the form of a continuous and connected narrative and not a series of separate instructions; that the parties might at any time submit to the court suggestions orally or in writing, and before the case was argued to

years of age and lived at home. [illegible]
got into the car with [illegible]
on Long Avenue.

[illegible]
a Mr. Gary, who [illegible]
automobile which [illegible]
the collision occurred. [illegible]
evidence tending to show [illegible]
sion, or for what purpose [illegible]
Parker did not testify in the case.

[illegible]
to be received as to certain said [illegible]
the accident [illegible] cites Lindsay v. [illegible]
M. W. 234; Barnes v. Stewart, 1ob [illegible]
C. & A. R. [illegible], 14 Ill. App. [illegible]; [illegible]
v. Bowker, 1ib Ill. App. 1.1. [illegible]
ing the proper foundation, [illegible]
a case of this nature. Milles v. [illegible]
Ainsley, 207 Pac. 72a. Indeed, evidence [illegible]
given by defendant, [illegible]
was received without only [illegible]
it at length. [illegible]

It is urged the court erred [illegible]
suggested instructions [illegible]
the trial section of [illegible]
State for [illegible]
vided, in substance, [illegible] instructions [illegible]
only as to the law of [illegible]
timous and commented derogative [illegible]
structions; that the parties might [illegible]
suggestions orally or in writing, and [illegible] to

the jury the parties should be given an opportunity out of the presence of the jury to read the instructions which the court proposed to give and to make other or further suggestions as to matters omitted, or objections as to such parts thereof as were deemed to be incorrect or misleading, "such suggestions or objections to be specific"; that suggestions not adopted and objections made but overruled might be made a ground for review but must be made before the jury retired from the bar or within such further time as the trial court might by order allow before the jury retired from the bar, or the same would be deemed to have been waived. Defendants did not make specific suggestions or objections. On the contrary, they submitted ten numbered instructions, and the only objection concerning refusal thereof is as follows:

"Mr. Dennen: Now, if the Court please, the defendants at this time desire to object to the court's refusal to incorporate into the defendants' instructions the suggestions for instructions tendered by the defendants, which are as follows: * "

following which are the ten instructions requested. We think, as plaintiff contends, that the form in which these requested instructions was submitted could hardly be called specific suggestions "to assist the court in fully and accurately instructing the jury as to the law" within the meaning of former section 67 of the Civil Practice act. However, we have given attention to these requested instructions, as well as those which were given by the court. The issues in the case were simple, and instructions concerning the same were full and accurate, covering well the propositions of law concerning which defendants desired the jury to be informed.

Defendants discuss these requested instructions in detail and cite cases in which it has been held by this court and the Supreme court not erroneous to give the same. The question, however, of whether it is error to give a certain instruction is quite different from the question arising upon a claimed error for refusal to give it. A requested instruction may be entirely free from error;

nevertheless, if the proposition of law which it announces has been covered by other instructions given to the jury, it is not error to refuse it. Indeed, the number of instructions upon a given proposition of law should not be needlessly multiplied and too many tend to confuse the jury to such an extent as to make a reversal necessary. We hold there was no reversible error in the rulings of the court on instructions given and refused.

The controlling questions in the case are raised by the contention of defendants that the judgment should not be allowed to stand against defendant William C. Panzer. The only evidence tending to connect him in any way with the accident is recited above. He was the owner of the Buick automobile; he was the father of the driver, who was a minor. The inference perhaps would be justified that the son was driving with the permission of the father, but there is no direct evidence on that point. The father did not testify, and the son gave no evidence other than as above recited as to these matters. The liability of the father cannot be inferred from the parental relationship. The "family purpose" doctrine in cases of this kind has after much consideration been repudiated by the Supreme court of Illinois. Arkin v. Page, 287 Ill. 420; White v. Seitz, 342 Ill. 266; Anderson v. Byrnes, 344 Ill. 240; Miller v. McHale, 263 Ill. App. 471; Lowdermilk v. Gibbel, 263 Ill. App. 384.

It is contended in behalf of William C. Panzer that the proof wholly fails to establish joint liability, and that the joint judgment cannot therefore be permitted to stand. It is also urged that a judgment against several defendants is a unit and cannot be reversed as to one or more of them and affirmed as to others, citing Livak v. Chicago & Erie R. R. Co., 299 Ill. 218, and McDermott v. A.B.C. Oil Burner Sales Corp., 266 Ill. App. 116; but the undoubted rule announced in those cases has been changed by the Civil Practice act and no longer prevails. Minnis v. Friend, 360 Ill.328.

nevertheless, if the proposition [illegible] a mere
covered by other instructions [illegible] to
refuse it. Indeed, our [illegible] request
for a jury should not be [illegible] to
to confuse the jury [illegible] real neces-
sity. We hold there was no reversible error in the [illegible] of the
court on instructions given and refused.

The contract [illegible]
contemplated [illegible] to
state against defendant Williams. [illegible] trans-
ing to correct this in any way [illegible]
He was the owner of the [illegible]
driver, who was a minor. [illegible]
that the [illegible]
is no direct evidence on that point. [illegible]
and the [illegible] no evidence [illegible]
matter. The liability of the [illegible]
parental relationship. [illegible]
this line of [illegible] by the
Supreme Court of Illinois. [illegible]
Dodge, 342 Ill. 266; [illegible]
Rodale, 255 Ill. App. 427; [illegible]

This is not [illegible]
proof sufficient [illegible]
judgment cannot [illegible]
that a judgment [illegible] be
reversed [illegible]
Ivan v. [illegible] v. [illegible]
A.H.C. Of Illinois [illegible]
doubted and [illegible] in [illegible] the civil
Practice act [illegible] longer [illegible] Minnie v. Brand, [illegible] 332

Plaintiff does not contend that there is any evidence in the record from which the jury could reasonably find negligence against William C. Panzer, but asserts that since plaintiff's declaration alleged agency and defendants filed only a plea of the general issue, this plea did not put in issue the ownership, operation or possession of the automobile, which stands admitted, and that where the ownership, operation and possession of the automobile are admitted by the pleadings, no evidence is necessary in order to establish the joint liability of defendants. Plaintiff, relying on the rule announced in McNulta v. Lockridge, 137 Ill. 270, afterward asserted in Chicago Union Traction Co. v. Jerka, 227 Ill. 95, and followed in a long line of cases in this and the Supreme court, asserts that joint liability is admitted by the pleadings. The rule is not as broad as plaintiff contends. While, generally, in the absence of a special plea, ownership, operation or possession of an instrumentality by which an injury was inflicted, is admitted, on the contrary, where the declaration alleges a joint act or acts of negligence on the part of two or more defendants, such joint negligence is not admitted even in the absence of a special plea. In such cases the burden is on plaintiff to establish the joint negligence as alleged in his declaration. This class of cases does not fall within the rule announced in the Jerka and similar cases, but constitutes an exception to the general rule there stated. Yeazel v. Alexander, 58 Ill. 254, sustains this view. Plaintiff owner there sued several defendant owners of trespassing cattle, alleging in his declaration that the cattle belonging to the several owners imparted an infectious disease to plaintiff's cattle. It was held that the burden was upon the plaintiff alleging joint negligence to prove it, although defendants had filed only the general issue, and that a defendant impleaded in such case could not plead in abatement, and for that reason was permitted to raise the ques-

[illegible]

the second [illegible]

against Wilkins v. Fryer, [illegible]

declaration alleges [illegible]

general issue, this plea [illegible]

tion or possession of [illegible]

that where an [illegible]

ville are entitled by the [illegible]

order to establish the joint [illegible]

rely on the rule [illegible]

attorney material in [illegible]

of, and followed in a [illegible]

court, asserts that [illegible]

the rule is not as broad as [illegible]

in the case of a [illegible]

of an instrumentality [illegible]

on the contrary, [illegible]

of negligence on the part of [illegible]

negligence is not [illegible]

In such cases the burden is on [illegible]

negligence [illegible]

not lay within the [illegible]

but constitutes an [illegible]

Vassal v. Alexander, 83 [illegible]

owner there was evidence [illegible]

alleging in the [illegible]

owners liquified an [illegible]

was said that the [illegible]

liance to prove it, although [illegible]

issue, and that a defendant [illegible]

in abatement, and for that reason [illegible]

tion of his joint liability under the plea of not guilty. Also, in United Breweries v. Bass, 121 Ill. App. 299, where several defendants filed a plea of not guilty to a charge of joint negligence, it was held that mere proof of ownership of the instrumentality by which the injury was inflicted, was not sufficient to establish liability under a plea of not guilty.

In McDermott v. A.B.C. Oil Burner Sales Corp., 266 Ill.App. 115, plaintiff sued two corporations, alleging liability by reason of joint negligence in allowing oil to leak from a tank and careless installation of the plant, together with joint trespass vi et armis. The court said:

"Plaintiff's claim is founded upon and the declaration charges that the two defendants committed a tort, the Sales Corporation as principal and the Automatic Corporation as agent, or that the two corporations acted in concert as joint feasors. It has always been the law that where two or more defendants are jointly charged with the commission of a tort the joint action of the defendants is negatived by a plea of not guilty. (Yeazel v. Alexander, 58 Ill. 254; Peters v. Howard, 206 Ill. App. 610; McHale v. McQuigg, 236 Ill. App. 295, 298; Blade v. Site of Ft. Dearborn Bldg. Corp., 245 Ill. App. 484, 489.)"

It was held that in the absence of proof of joint acts of negligence, the judgment was erroneous as to one of defendants, and on the authority of Livak v. Chicago & Erie R. Co., 299 Ill. 213, the judgment was reversed and the cause remanded as to both.

In McHale v. McQuigg, 236 Ill. App. 295, plaintiff sued husband and wife, alleging joint negligence in the operation of an automobile owned by the wife, and defendants filed a plea of not guilty without special pleas. The proof showed the operation of the automobile by the wife alone. It was held that a judgment against the husband was erroneous. The court said:

"It is the general rule that a husband is not liable for the torts of his wife except when the wife acts as the agent or servant of the husband, and then under the doctrine of respondeat superior. McNemar v. Cohn, 115 Ill. App. 31.

* * *

"Plaintiff alleged joint ownership and operation, and argues that the general issue admits both allegations under the rule announced in Chicago Union Traction Co. v. Jerka, 227 Ill.95,

tion of his joint liability [illegible]

in United Breweries v. [illegible]

terdants filed a plea [illegible]

gence, it was held [illegible]

nity by which the injury [illegible]

tortious liability under [illegible]

In Robertson v. [illegible]

lit", liability was [illegible]

of joint negligence in [illegible]

less installation of the [illegible]

supra. The court said:

"Liability's also is [illegible]

energy [illegible] the law [illegible]

protection as principal [illegible]

that the corporation [illegible]

has always been the law [illegible]

joint [illegible]

of the defendants is supported by [illegible]

v. Bierman, [illegible]

Mahnke v. Moehlman, 298 [illegible]

Operating Co. v. [illegible]

It was held that [illegible]

the judgment was [illegible]

thority of Lyon v. [illegible]

Rent was reversed [illegible]

In Adams v. [illegible]

Brydon and wife, [illegible]

authority [illegible]

nality without [illegible]

the authorities [illegible]

against the [illegible]

"[illegible]

the terms of his wife [illegible]

servant of the [illegible]

supplier. Hoffman v. [illegible]

"Liability also [illegible]

argues that the [illegible]

rule announced in Chicago [illegible] v. [illegible]

and many other similar cases. * *

"'It is laid down in all works on pleading that if two or more persons are sued for a tort committed by one only, a misjoinder cannot be pleaded; the proper plea for those not guilty is the general issue.' Yeazel v. Alexander, 58 Ill. 255; Economy Light & Power Co. v. Hiller, 203 Ill. 518.

"We are referred to no cases changing this rule. It would be unreasonable to stretch the rule in the Jerka case to include the charge of joint liability."

In Evans v. Stern, 274 Ill. App. 667, it appeared that defendant wife alone negligently drove an automobile owned by the husband, who was made a defendant by the injured plaintiff. Plaintiff in his declaration alleged joint negligence. Defendants pleaded the general issue without a special plea by either of them. The evidence disclosed that defendant husband was not present at the time of the accident, and this court, following McHale v. McQuigg, reversed the joint judgment against them and remanded the cause. We there said:

"This court has held that in a personal injury case where the declaration charges that defendants jointly committed the wrongful act, the plea of not guilty does not admit the joint ownership and operation of the instrumentality involved. McHale v. McQuigg, 236 Ill. App. 295; Blade v. Site of Ft. Dearborn Bldg. Corp., 245 Ill. App. 484; McDermott v. A.B.C. Oil Burner Sales Corp., etc., 266 Ill. App. 115.

* * *

"In the instant case we hold that the plea of not guilty negatived the joint tort charged against the defendants."

In later cases this court and the Supreme court modified the rules announced as to other points in McHale v. McQuigg, (Barran v. Adanick, 251 Ill. App. 481; Skala v. Lehon, 258 Ill. App. 252, affirmed by the Supreme court in 343 Ill. 602) but the rule announced in the former cases that where the declaration alleges acts of joint negligence by several defendants, and defendants enter a plea of not guilty without special pleas, the burden is cast upon plaintiff to prove the joint acts of negligence, as alleged, has not been changed by these later cases which seem to announce a rule of convenience only to the effect that in an action against a servant for his negligence, plaintiff may also join his master, who may be liable upon the theory of respondeat superior.

and many other similar cases.

"It is [illegible] more persons are made [illegible] joiner cannot be pleaded; [illegible] the general issue." [illegible] v. [illegible], [illegible]; [illegible] Light & Power Co. v. [illegible], [illegible].

"[illegible] would be unreasonable [illegible] insure the change of [illegible] 11 [illegible].

In [illegible] v. [illegible], [illegible] tenant with [illegible] damaged, the [illegible] liability [illegible] plaintiff [illegible] placed the [illegible] The evidence [illegible] the time of the accident, [illegible] Quin, referred the jury [illegible] cause. He there said:

"While [illegible] the defendants [illegible] wrongful act, the plea of [illegible] circumstances and operation of the [illegible] v. [illegible], 224 [illegible] 207; [illegible] Burr, [illegible] Corr., [illegible] 1[illegible] 1[illegible].

"In the instant case [illegible] negligent the [illegible]

In [illegible] the rule announced as [illegible] (Barker v. Atlantic, [illegible] App. 324, affirmed by [illegible] rule announced in the [illegible] larger rule of joint [illegible] made under a plea of [illegible] is cast upon [illegible] alleged, [illegible] announce a rule of [illegible] against a servant for his negligence, [illegible] master, who may be liable [illegible]

The declaration here alleges joint acts of negligence against both defendants. The theory of respondeat superior is not set forth in any count of the declaration. So far as William C. Panzer is concerned, there is no proof of negligence at all, and the judgment against him must be reversed for that reason. There is no error as to defendant Frederick C. Panzer, and under the rule announced in Minnis v. Friend, 360 Ill. 328, the judgment as to him will be affirmed.

JUDGMENT AFFIRMED AS TO FREDERICK C. PANZER.

JUDGMENT REVERSED AS TO WILLIAM C. PANZER.

McSurely, P. J., concurs.

O'Connor, J., specially concurring:

The evidence shows that William C. Panzer, the father, owned the automobile; that his 18 year old son, Frederick, the other defendant, took the automobile and went to a party for his own pleasure and not on any errand for his father.

A father who permits his son to use an automobile for the son's own pleasure is not liable for the torts of his son which occur while the son is so using the automobile. White v. Seitz, 342 Ill. 266. All the evidence shows that the father, under the law, was in no way to blame for the unfortunate accident. Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387.

The designation here alleges [illegible] against both defendants. The theory of [illegible] in [illegible] in any count of the designation. To [illegible] concerned, there is no proof [illegible] ments against him must be reversed [illegible] error as to defendant Brodericks [illegible] announced in Kinnie v. Kinnie, [illegible] him will be affirmed.

[illegible]

Mokurely, P. J., concurs.

O'Connor, J., specially concurring:

The evidence shows that Kathleen [illegible] owned the automobile; that his 18 year [illegible] other defendant, took the automobile [illegible] own pleasure and not on any errand for [illegible].

A father who permits his son to use [illegible] son's own pleasure is not liable for the torts of [illegible] occur while the son is using the [illegible] 342 Ill. 285. All the evidence [illegible] law, was in no way to blame for the unfortunate [illegible] v. State Quincy Factory Church, [illegible].

38660

ORA L. PERRY,
Appellee,

vs.

W. H. DARLINGTON et al.,
Defendants.

WILLIAM D. MEYERING,
Sheriff of Cook County,
Appellant.

28

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

285 I.A. 582

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On May 14, 1931, an execution issued to Meyering, then Sheriff of Cook county, upon a judgment entered in favor of W. H. Darlington and against N. I. Perry, husband of plaintiff. July 21, 1931, Meyering by his deputy levied under the writ upon goods and chattels in the apartment occupied by the judgment debtor and plaintiff, his wife. A custodian was put in charge and remained in possession of the goods and chattels until July 30, 1931, when upon order of the judgment creditor, the levy was released. This litigation is the sequel to that levy.

September 11, 1931, plaintiff filed this suit, making defendants thereto Meyering, W. H. Darlington, judgment creditor, his wife Mrs. W. H. Darlington, and Austin E. Torney and Frederick C. Jonas, who had acted as attorneys in the matter. She filed a declaration in five counts, in each of which she charged that these defendants vi et armis broke into and entered her premises, assaulted her, etc. All the defendants except Meyering entered pleas of not guilty. Meyering, sheriff, entered a plea of not guilty as to the first, second and third counts and a demurrer to the fourth and fifth. The demurrer was overruled, whereupon he entered a plea of not guilty as to these counts also and special pleas of justification to the effect that he was sheriff; that he had received the execution on May 14th against N. I. Perry, who lived with his wife, plaintiff, in an apartment,

38960

ORA L. PERRY, Appellee,	)
vs.	)
W. H. DARLINGTON et al., Defendants.	)
WILLIAM D. MEYERING, Sheriff of Cook County, Appellant.	)

[illegible]

[illegible]

MR. JUSTICE MATCHETT DELIVERED [illegible]

On May 14, 1931, an execution [illegible] Sheriff of Cook county, upon a judgment [illegible] Darlington and against [illegible] 21, 1931, levying by his deputy [illegible] and chattels in the apartment occupied by the judgment debtor and plaintiff, his wife. A claim was [illegible] in possession of the goods and chattels until July 30, 1931, when upon order of the judgment creditor, the levy was released. This litigation is the sequel to that levy.

September 11, 1931, plaintiff [illegible] ants thereto Meyering, W. H. Darlington, [illegible] Mrs. W. H. Darlington, and Austin [illegible] who had acted as attorneys [illegible] five counts, in each of which [illegible] armis broke into and entered [illegible] the defendants except [illegible] sheriff, entered a plea of not [illegible] third counts and a demurrer to the fourth and fifth. The demurrer was overruled, whereupon he entered a plea of not guilty as to those counts also and special pleas of justification to the effect that he was sheriff; that he had received the execution on May 14, against E. I. Perry, who lived with his wife, plaintiff, in the apartment,

and that by his deputy duly appointed, he entered peaceably and levied on goods not exempt and in good faith, acting by his deputy, etc.

Plaintiff filed replications to these pleas to the effect that Meyering "of his own wrong and with force and arms and without cause, committed the several trespasses", etc. The cause was tried by a jury. Motions for an instructed verdict to all the defendants except Meyering were granted. As to Meyering, the cause was submitted to a jury, which returned a verdict of guilty with damages of $12,000. Plaintiff remitted $8000 and the court, overruling the motion of defendant for a new trial and in arrest, entered judgment for $4000, from which defendant has appealed.

It is urged that the verdict and the judgment are against the manifest weight of the evidence; that the court erred in denying a motion of defendant Meyering made at the close of all the evidence for an instructed verdict on the ground of variance, in denying the motion of defendant to strike out certain incompetent evidence, and in giving erroneous instructions to the jury at the request of plaintiff; that the judgment was so excessive as to indicate passion and prejudice on the part of the jury, and that a new trial should have been granted for that reason.

The contention that the verdict and the judgment are against the manifest weight of the evidence does not appear to be entirely without merit, since the evidence submitted in behalf of plaintiff is in some respects inconsistent and inherently improbable. Quock Ting v. U. S., 140 U. S. 417; C. & A. R. R. Co. v. Vremeister, 112 Ill. 346; Highley v. American Exchange Nat'l Bank, 86 Ill. App. 48; C. P. & St. L. Ry. Co. v. DeFreitas, 109 Ill. App. 104; Brown v. Chicago City Ry. Co., 155 Ill. App. 434. There are also many cases which would sustain a reversal, notwithstanding the remittitur, because the verdict was so excessive as

and that by his deputy duly appointed, [illegible] accordingly and levied on goods not exempt and in [illegible], [illegible] to deputy, etc.

Plaintiff filed replications [illegible] that [illegible] that Meyering "of his own [illegible] and [illegible] causes, committed the several trespasses", [illegible] tried by a jury. Motions for an instruction [illegible] exceptions were granted. As to Meyering, [illegible] mitted to a jury, which returned a verdict [illegible] of $12,000. Plaintiff remitted $3000 [illegible], overruling the motion of defendant for a new trial and in [illegible], entered judgment for $4000, from which defendant has appealed.

It is urged that the verdict [illegible] the manifest weight of the evidence; [illegible] ing a motion of defendant Meyering made [illegible] dence for an instructed verdict on the ground [illegible] ing the motion of defendant to strike out certain [illegible] dence, and in giving erroneous instructions [illegible] quest of plaintiff; that the judgment was [illegible] dicate passion and prejudice on the part of [illegible], and that a new trial should have been granted [illegible].

The contention that the verdict [illegible] against the manifest weight of the evidence [illegible] entirely without merit, since the evidence [illegible] plaintiff is in some respects inconsistent [illegible] probable. Quock Ting v. [illegible], [illegible] Co. v. Vrooelater, 112 Ill. 346; Hughley v. [illegible] Bank, 86 Ill. App. 48; C. I. & St. L. Ry. Co. v. Dethrlins, 100 Ill. App. 104; Brown v. Chicago City [illegible], [illegible] App. 494. There are also many cases which would sustain a [illegible] sustaining the rectitude, because the verdict was so excessive as

to show passion and prejudice on the part of the Jury. Loewenthal v. Streng, 90 Ill. 74; Wabash R. R. Co. v. Billings, 212 Ill. 37; Eidem v. C. R. I. & P. R. R. Co., 144 Ill. App. 320; Loftus v. Ill. Midland Coal Co., 181 Ill. App. 197.

Defendant, however, further contends earnestly that the court erred in admitting in evidence, over the objection of defendant, the execution under which the deputy sheriff acted, and that the instruction in favor of defendant, requested at the close of all the evidence, should have been given for the reason that there was a fatal variance, in that nowhere in the declaration was it alleged that defendant Meyering was the sheriff of Cook county, nor that any of the alleged trespasses were committed by him as sheriff, nor that he acted in the matter of the levy through a deputy sheriff, or that the supposed trespasses were committed under color of any writ or other process. In the title of the declaration and in the several counts, defendant Meyering is named as "William D. Meyering, sheriff of Cook County," but defendant contends (and rightly, we think) that this title is merely descriptive and constitutes no material part of the declaration. West Chicago Park Commissioners v. Schillinger, 117 Ill. App. 525; Moll v. Sanitary District, 131 Ill. App. 155, and numerous other cases which so hold as to other public officials, are cited. We do not doubt that the same rule would be applicable in the case of a sheriff. Defendant argues that the ultimate fact, which the evidence tends to prove, is that Meyering as sheriff of Cook county, acting by his deputy, committed these various trespasses, but that this ultimate fact is not alleged anywhere in the declaration. Defendant cites a number of cases which state the general rule that a declaration must aver and the evidence establish facts authorizing a recovery. Hollenbeck v. Winnebago County, 95 Ill. 148; Buckley v. Mandel Bros., 333 Ill. 368. These cases sustain that rule and

to show passion and prejudice on the part of the jury. Cosgrove v. Byrne, 90 Ill. 74; [illegible] v. [illegible], [illegible] 37; Biggs v. C. R. I. & P. R. Co., 116 Ill. [illegible] 82; Lorimer v. Ill. Midland Coal Co., 108 Ill. App. 187.

Defendant, however, further contends that [illegible] the court erred in admitting in evidence, over the objection of defendant, the execution under which the property was sold, and that the instruction in favor of [illegible], [illegible] of all the evidence, should have been given for the [illegible] that there was a total variance, in that notwithstanding the [illegible] it alleged that defendant [illegible] was the sheriff of Lee county, nor that any of the alleged trespasses were committed by him as sheriff, nor that he acted in the matter of the levy [illegible] a deputy sheriff, or that the alleged trespasses were committed under color of any writ or other process. In the title of the declaration and in the several counts, defendant [illegible] in [illegible] as "William D. Meyering, sheriff of Lee county," but defendant contends (and rightly, we think) that this title is merely descriptive and constitutes no material part of the declaration. Cast [illegible] Park Commissioners v. Schillinger, 117 Ill. App. [illegible]; Cox v. Sanitary District, 141 Ill. App. 151. [illegible] cases while so held as to other public officers, [illegible] doubt that the same rule would be applicable [illegible] sheriff.

Defendant argues that the ultimate fact, which the evidence tends to prove, is that Meyering as sheriff of Lee county, acting by his deputy, committed these various trespasses, and that this ultimate fact is not alleged in the declaration. Defendant cites a number of cases which state the general rule that a declaration must aver and the evidence must show facts authorizing a recovery. Hollenbeck v. Winnebago County, 95 Ill. 148; Hurley v. Mendel Bros., 232 Ill. 366. These cases assert that rule and

also hold that a declaration failing to allege a fact, without the existence of which plaintiff was not entitled to recover, does not state a cause of action. The undisputed evidence shows that Meyering did not participate personally in the alleged trespasses on which the suit is based. The declaration alleges such personal participation by him.

Defendant suggests that the execution was admitted in evidence and the motion for an instructed verdict for defendant because of variance was denied upon the authority of Skala v. Lehon, 343 Ill. 602. That case is, however, clearly distinguishable in that the declaration there averred joint negligence of a master and his servant: the servant upon the theory that he was negligent; the master upon the theory that he was liable for the negligence of his servant upon the principle of respondeat superior. Here, the declaration alleges trespasses vi et armis in every count. The sheriff is sued personally. The deputy through whom he acted is not made a party to the suit. The authorities seem to hold that under such circumstances it is not necessary that plaintiff invoke the doctrine of respondeat superior in order to charge the sheriff. Under the law he is present whenever and wherever he acts by his duly authorized deputy in an official capacity. If the deputy while so acting commits a trespass, the sheriff is personally liable as if he were present. The allegation of the declaration of a trespass by the sheriff is substantiated by proof showing that he trespassed by his deputy acting in an official capacity. There was, therefore, no variance. 20 Encyc. Pl. & Pr. 143; 57 C. J. 951, sec. 643. Indeed, some of the cases seem to hold that in such case the sheriff, and not the deputy, should be sued. Campbell v. Phelps, 18 Mass. 61. At any rate, by the better reasoning and also by the weight of authority, it was not necessary at common law in such case to charge that the sheriff acted in an official capacity. Young v. Long, 124 Wash. 460;

also hold that a declaration failing to allege a fact, upon the existence of which plaintiff was not entitled to recover, does not state a cause of action. The undisputed evidence shows that defendant did not participate personally in the alleged trespasses on which the suit is based. The declaration alleges such personal participation by him.

Defendant suggests that the exclusion of the offer in evidence and the motion for an instructed verdict for defendant because of variance was denied upon the authority of Shaw v. Gibson, 243 Ill. 602. That case is, however, not in point. It is true that the declaration there averred joint liability of a master and his servant: the servant upon the theory that he was liable for the negligence; the master upon the theory that he was liable for the negligence of his servant upon the principle of respondeat superior. Here, the declaration alleges trespasses vi et armis in every count. The sheriff is sued personally. The county through which the court is not made a party to the suit. The authorities seem to hold that under such circumstances it is not necessary that plaintiff invoke the doctrine of respondeat superior in order to charge the sheriff. Under the law he is present whenever and wherever he acts by his duly authorized deputy in an official capacity. If the deputy while so acting commits a trespass, the sheriff is personally liable as if he were present. The allegation of the declaration of a trespass by the sheriff is substantiated by proof showing that no trespassed by his deputy acting in an official capacity. Under such, or more, no variance. 20 Enoyc. Pl. & Pr. 143; 97 C. J. 921, sec. 341. Indeed, some of the cases seem to hold that in such case the sheriff, and not the deputy, should be sued. Dawson v. Phelps, 1 Ohio, 31. At any rate, by the better reasoning and also by the weight of authority, it was not necessary at common law in such case to allege that the sheriff acted in an official capacity. Young v. Long, 12 Ark. 460;

Jackson v. Harries, 236 Pac. 234; Curtis v. Fay, 37 Barb. (N.Y.) 64; Moores v. Winter, 67 Ark. 189.

The instant suit was begun prior to the date upon which the Civil Practice act became effective. Whether the allegations of this declaration would be sufficient under the provisions of that act it is not necessary to consider or decide.

For reasons which we have already indicated, it was important that the jury should be accurately instructed as to the law applicable, and defendant argues serious errors in this respect. Complaint is made of instruction No. 1 given by the court, which is as follows:

"The court instructs you that an officer, although armed with a writ of execution, acts at his peril and when he levies upon the property of a person other than the defendant in the writ and assumes custody and possession of such person's property, he is liable and the writ will be no defense in a suit for trespass.

If you find from the evidence that the plaintiff has established, by a preponderance of the evidence, that the defendant, William D. Meyering, sheriff, by his deputy, entered into her premises forcibly and against her will, then he is guilty of trespass and it is then your duty to find him guilty and assess plaintiff damages in such sum as you find from the evidence she has sustained."

It is objected that the first paragraph of this instruction is entirely abstract and has nothing to do with the facts involved in the case at bar. This objection is good. Moreover, the instruction assumes that the property levied on belonged to plaintiff when there was evidence to the contrary.

It is not true (as the instruction says) that the writ would be no defense to a suit for trespass where the officer levies it upon the property of a person other than the defendant in the writ. If the officer acted in good faith in such case, plaintiff would be limited to actual damages; if, in fact, he had no writ the question of his good faith would be immaterial and plaintiff might recover not only actual but punitive damages. Becker v. Dupree, 75 Ill. 167.

The second paragraph of the instruction, by which the jury was told that it might "assess plaintiff damages in such sum as you

Jackson v. Harvey, 230 Pac. 234; Garfield v. Ins. Co., 37 [illegible] (N.Y.) 64; Moores v. Winter, 97 Ark. 180.

The instant suit was begun prior to the time when the Civil Practice Act became effective. Whether the application of this declaration would be sufficient under the provisions of 2-1-1 Act it is not necessary to consider or decide.

For reasons which we have [illegible], it was incumbent that the jury should be accurately instructed as to the applicable, and defendant argues serious errors in it respect. Complaint is made of instruction No. 1 given by the court, which is as follows:

"The court instructs you that an officer, although armed with a writ of execution, levies at his peril and even he levies upon the property of a person other than the defendant in the writ and assumes custody and possession of such person's property, he is liable and the writ will be no defense in a suit for trespass.

If you find from the evidence that the plaintiff has established, by a preponderance of the evidence, that the defendant, William D. Meyering, sheriff, by his deputy, entered into her premises forcibly and against her will, then he is guilty of trespass and it is then your duty to find his liability and assess plaintiff damages in such sum as you find from the evidence to be [illegible]."

It is objected that the first paragraph of this instruction is entirely abstract and has not in [illegible] of the [illegible] involved in the case at bar. This objection is [illegible], however, the instruction assumes that the property levied on belonged to plaintiff when there was evidence to the contrary.

It is not true (as the instruction [illegible]) that the writ would be no defense to a suit for trespass [illegible] if it upon the property of a person other than the defendant in the writ. If the officer acted in good faith in so doing, plaintiff would be limited to actual damages; if, in fact, he [illegible] the writ the protection of his good faith would be immaterial and plaintiff could recover not only actual but punitive damages. Hooper v. Lane, 75 Ill. 167.

The second paragraph of the instruction, by which the jury was told that it might "assess plaintiff damages in such sum as you

find from the evidence she has sustained," was also erroneous. Plaintiff was not entitled to recover damages unless the jury from a preponderance of the evidence found that defendant was guilty; that she had sustained damages; that the damages were alleged in the declaration and were the immediate or proximate result of the guilty acts of defendant. If damages had been sustained but were not alleged or were not the immediate result of the wrong committed, then plaintiff was not entitled to recover therefor. We hold the instruction was misleading, inaccurate and confusing, was prejudicially erroneous and regardless of other alleged errors would compel a reversal of the judgment.

Complaint is also made of instruction No. 4, which is as follows:

"The court instructs you that a trespasser is one who intrudes upon the person or property of another without the consent or permission of that person and without authority of law. A trespasser is liable for the natural and proximate consequences of his conduct. If, in committing a trespass, one inflicts injury upon another either physical or mental he is liable for such injury. If a trespasser uses force or acts in a reckless and wanton manner, and in so doing injures another, then he is liable for punitive damages. Punitive damages are such damages as, in the opinion of the jury examining into the facts of a particular case, will act as a proper punishment and example to prevent further trespasses of like character."

This instruction in effect tells the jury that if there is a trespass by force, the trespasser may be subjected to punitive damages. This is not an accurate statement of the law. It is only when the trespass is committed wilfully, maliciously or wantonly that punitive damages may be allowed. In 17 C. J. 974, the rule as to punitive damages is stated as follows;

"In order that there may be a recovery of exemplary damages, there must be present in the circumstances some element of malice, fraud, or gross negligence, otherwise the measure of damages is such an amount as will constitute a just and reasonable compensation for the loss sustained, and nothing more. In other words, the wrongs to which exemplary damages are applicable are those which besides violating a right, and inflicting actual damages, import insult, fraud, or oppression, and are not merely injuries, but injuries inflicted in a spirit of wanton disregard of the rights of others."

find from the evidence one has [illegible]," was [illegible] so. Plaintiff was not entitled to recover damages [illegible] from a preponderance of the evidence [illegible] was guilty; that she had sustained damages; [illegible] were alleged in the declaration and were the [illegible] result of the guilty acts of defendant. [illegible] sustained but were not alleged or were [illegible] the wrong committed, then plaintiff was not [illegible] therefor. We hold the instruction was misleading, inadequate and confusing, was prejudicially erroneous, and requires a reversal of the judgment. Other minor legal errors will cause a reversal of the judgment.

Complaint is also made of instruction [illegible], which is as follows:

"The court instructs you that a trespasser is one who intrudes upon the person or property of another without the consent or permission of that person and without [illegible] law. A trespasser is liable for the natural and proximate consequences of his conduct. If, in committing a trespass, one is liable for injury upon another either physical or mental he is liable for such injury. If a trespasser uses force or even a threatening and violent manner, and in so doing injures another, he is liable for punitive damages. Punitive damages are not [illegible] as, in the opinion of the jury examining into the facts of a particular case, will act as a proper punishment and [illegible] the offender for trespasses of like character."

This instruction in effect tells the jury that if there is a trespass by force, the trespasser may be mulcted in punitive damages. This is not an accurate statement of the law. [illegible] only when the trespass is committed willfully, maliciously or wantonly, that punitive damages may be allowed. In 17 R. C. L. 277, [illegible] as to punitive damages is stated as follows:

"In order that there may be a recovery for punitive damages, there must be present in the circumstances [illegible] of malice, fraud, or gross negligence, or criminal [illegible] or [illegible] is such an amount as will constitute a [illegible] for the loss sustained, and nothing more. In other words, the wrongs to which exemplary damages are applicable are those which involve violating a right, and inflicting actual damage, insult, fraud, or oppression, and are not merely injurious, and injuries inflicted in a spirit of wanton disregard of the rights of others."

To the same effect are Cutler v. Smith, 57 Ill. 252; Rhodes-Burford Co. v. Gartner, 133 Ill. App. 164. The instruction is also erroneous because it told the jury in the hypothetical case that the trespasser is liable for punitive damages. Punitive damages are not allowed as a matter of right. The question of whether they should be allowed in a proper case always rests in the discretion of the jury. The instruction informed the jury that under the circumstances indicated defendant would be liable as a matter of law for such punitive damages.

In W. St. L. & P. Ry. Co. v. Rector, 104 Ill. 296, our Supreme court considered a similar instruction, which told the jury that plaintiff under given circumstances was "entitled" to such additional damages as the jury might in its judgment allow by way of punishment. The court said:

"The vice of this instruction consists chiefly in the fact that it states the rule as to vindictive or punitive damages broader than the law will warrant. Where an injury is wantonly and wilfully inflicted, the jury may, in addition to actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for such wilful injury, but it is not understood that the injured party is 'entitled' to such damages as a matter of right, and an instruction that tells the jury, as a matter of law, the injured party is 'entitled' to such damages, goes too far, and is for that reasen vicious."

The instruction is clearly erroneous, for although defendant was a trespasser, and even though he were a wilful trespasser, plaintiff would not be entitled to punitive damages as a matter of law, but only in the discretion of the jury which might, or might not, award punitive damages. This rule is important in this case because of the fact that the uncontradicted evidence shows that defendant Meyering was not the actual wrongdoer, and that if he was liable at all, it was only by reason of the action of another.

Complaint is also made of instruction No. 8, which is as follows:

"The court instructs you that it is not necessary, in order to constitute wilful or wanton conduct in this case, that the plain-

To the same effect [illegible] Co. v. Gartner, 134 Ind. [illegible]. The instruction is also erroneous because it told the jury in [illegible] that the trespasser is liable for punitive damages. [illegible] as a matter of right, the [illegible] of vessels [illegible] allowed in a proper case [illegible] in the discretion of the jury. The instruction informed the jury [illegible] dicted defendant would be liable [illegible] punitive damages.

In [illegible] v. Hector, [illegible] preme court considered a similar instruction, [illegible] that plaintiff under [illegible] ditional damages as the jury might in its judgment [illegible] punishment. The court said:

"The rule of this instruction [illegible] that it states the rule as to vindictive or punitive damages [illegible] than the law will warrant. Where an injury is wantonly and willfully inflicted, the jury may, in addition to actual damages sustained, visit upon the wrongdoer vindictive or exemplary damages by way of punishment for such willful injury, but it is not held that the injured party is 'entitled' to such damages as a matter of right, and an instruction that tells the jury, as a matter of law, the injured party is 'entitled' to such damages, [illegible] for that reason vicious."

The instruction is clearly erroneous, for [illegible] was a trespasser, and even though he were [illegible] trespasser, [illegible] would not be entitled to punitive damages [illegible] law, but only in the discretion of the jury [illegible] punitive damages. This rule is important [illegible] the fact that the unauthorized [illegible] ing was not the actual wrongdoer, and [illegible] it was only by reason of the action of another.

Complaint is also made of [illegible] follows:

"The court instructs you that it is not necessary, in order to constitute willful or wanton conduct in this case, that the plain-

tiff prove that defendant, William D. Meyering, sheriff, acted by ill will toward the plaintiff, but it is sufficient for the plaintiff to show that defendant, William D. Meyering, sheriff, acting through his deputy, acted with reckless indifference to the circumstances or without any care for the life, person or property of the plaintiff."

It is urged that this instruction assumes by implication the guilt of defendant and therefore constitutes an invasion of the province of the jury, and we think the instruction is justly subject to that criticism. It is, of course, error in any instruction to assume as true any fact which is in dispute. Hawk v. Ridgway, 33 Ill. 473; C. & N. W. Ry. Co. v. Moranda, 108 Ill. 576; I. C. R. R. Co. v. Zang, 10 Ill. App. 594; Friedman v. Shuflitowski, 182 Ill. App. 5.

For the errors in these instructions the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., concurs.

O'Connor, J., specially concurring: I agree with the result but not with all that is said. Instruction No. 4 would in no way help the jury, but only confuse.

38709

PEOPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

vs.

LOGAN SQUARE STATE AND SAVINGS BANK, a Corporation,

LAFAYETTE COUNCIL NO. 361, KNIGHTS OF COLUMBUS (Intervening Petitioner) Appellant,

vs.

WILLIAM L. O'CONNELL, Receiver of Logan Square State and Savings Bank, (Respondent) Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

285 I.A. 582

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by petitioner, Lafayette Council No. 361, Knights of Columbus, from an order which denied its prayer for the allowance of the sum of $2752.93 as a preferred claim against the assets of the Logan Square State & Savings Bank, in which O'Connell is receiver. The matter was heard upon exceptions to the report of a master. The exceptions were overruled and an order entered denying the preference but allowing the amount due petitioner at the closing of the bank as a general claim.

The facts can hardly be said to be in dispute. The bank was closed by the auditor of public accounts June 17, 1932, and a receiver appointed, of whom O'Connell is successor. The petition was filed December 16, 1933. It averred a credit in its favor at the closing of the bank to the amount claimed, and it is earnestly contended by petitioner that for the reasons hereinafter stated this credit at the bank was impressed with a trust in its favor, and that the claim should therefore be preferred to those of other creditors. The claim for a preference is based primarily upon the theory that the fund in the bank was impressed with a trust because

38709

[illegible] OF THE STATE OF [illegible]
OSCAR [illegible], Auditor of Public Accounts
of the State of Illinois,

vs.

[illegible]
a Corporation,

LAFAYETTE [illegible] No. 361, [illegible]
COLUMBUS (Infty-[illegible] [illegible]
[illegible]

vs.

WILLIAM I. O'[illegible], Receiver of [illegible]
Square State and Savings Bank,
(Respondent)
Appellee.

MR. JUSTICE [illegible] delivered the opinion [illegible]

This [illegible] is by [illegible] [illegible]
liquidate of [illegible], [illegible]
allowance of the [illegible] of [illegible]
assets of the [illegible]
is receiver. The [illegible]
of a master. The proceedings [illegible]
denying the [illegible]
the closing of the bank [illegible]

The [illegible]
was closed by the [illegible]
receiver appointed, of whom [illegible]
was filed December [illegible]
the closing of the [illegible]
contended by [illegible]
this credit at the [illegible]
and that the claim [illegible]
creditors. The claim [illegible]
theory that the fund in the [illegible]

of an agreement made at the time the account of petitioner was opened at the bank. The facts in this respect appear to be that on or about July 27, 1931, Peter S. Richlowski, who was then assistant cashier of the bank, which has since closed, met with the trustees and officers of the Lafayette Council in its offices. Richlowski was also the treasurer of the council. The evidence tends to show that the question of opening up an account in the bank was at that time discussed, and it was decided to open such account and instructions were given to him that all the money belonging to the council should be deposited in defendant bank and the checks cleared through it, but that whenever the amount on deposit exceeded $500, the excess should be transferred to the First National Bank of Chicago; that Richlowski agreed to do this and said that he would follow the instructions. No other officer of the bank apparently had knowledge of these instructions or the arrangement made between the officials of the council and Richlowski. A notice of a resolution adopted that day (July 27, 1931) was sent to defendant bank and is in evidence. It is to the effect that at a meeting of the trustees of the council on July 27th a resolution was adopted authorizing grand knight Jacob A. Mueller and treasurer Peter S. Richlowski, whose signatures appeared on the document, to draw, sign, endorse and guarantee orders and checks on the Logan Square State & Savings Bank, or any other bank, company, person or persons, etc., "with the provision that checks drawn on this account will be payable only to the First National Bank of Chicago."

The account was opened, and all checks thereon were signed "Lafayette Council No. 361, K. of C., Peter S. Richlowski, Treasurer." The first deposit appears to have been made July 28, 1931, in the amount of $1290.71. The agreement in regard to the transfer of amounts in the account exceeding $500 to the First National Bank

of an agreement made at the time the [illegible] opened at the bank. The truth is this: [illegible] on or about July 27, 1921, [illegible] assistant cashier of the bank, [illegible] the trustees and officers of the [illegible] Hightower was also the treasurer [illegible] tempts to show that the [illegible] bank was at that time insolvent, [illegible] account and instructions were given [illegible] longing, to the council [illegible] the checks issued thereon [illegible] posit exceeded $50, the excess [illegible] National Bank of Chicago; that Hightower [illegible] said that he would follow the instructions [illegible] the bank apparently had knowledge of [illegible] arrangement made between the officials [illegible] said. A notice of a resolution adopted [illegible] was sent to defendant bank and it in [illegible] that at a meeting of the trustees [illegible] resolution was adopted [illegible] and Treasurer Peter C. Hightower [illegible] document, to draw, sign, [illegible] on the Logan Square State [illegible] pany, person or persons, etc., [illegible] drawn on this account [illegible] Bank of Chicago."

The account was opened, [illegible] "Lafayette Council No. 361, K. of C., [illegible] The first deposit appears to have been made [illegible] amount of $1200.71. The [illegible] amounts in the account exceeding $50 to the first National Bank

does not appear to have been complied with. Two days before the bank closed, Jacob Mueller discovered that there was on deposit in the bank $5155.23. He went to Richlowski, who was acting as cashier of the bank and told him to move the money to the First National Bank of Chicago. The bank then transmitted a check for $1000 to the First National Bank, and at that time Richlowski stated he had sent another check through for $1500 and promised he would send another check for the same amount. While the last mentioned check was in the process of clearing, the bank closed and a receiver was appointed.

On the morning of June 17, 1932, before the bank closed, Mueller learned that his demand for the transmission of the money to the First National Bank had not been complied with, and that there remained on deposit $2752.93. Thereupon, acting as grand knight of the council, he made out a check payable to currency for the whole amount on deposit and demanded payment. The teller refused payment and called in the president of the bank who directed the teller to give Mueller either the cash or some securities. The teller then began to figure the interest on certain securities, and while he was doing so the state auditor appeared and ordered the teller out of the cage and closed the bank. The check for $2752.93 has never been paid by the bank and is now in possession of its receiver. Mueller, however, was notified by the receiver to come and get the check.

Several of the trustees of petitioner council testified to the conversation with Richlowski which preceded the opening of the account. Their testimony is to the effect that they gave instructions to him that the excess above $500 should be transferred to the First National Bank and that $500 should be kept in the defendant bank as a stationary or compensation balance. Riesel, a trustee of the council, testified that whenever an amount was over $500 after deposit had been made,

does not appear to have been [illegible]
bank closed, Jacob Mueller [illegible]
in the bank $[illegible]. [illegible]
cashier of the [illegible]
National Bank of Chicago. [illegible]
$1000 to the First [illegible]
stated he had [illegible]
he would send another check for [illegible]
mentioned check was in the process of [illegible]
and a receiver was [illegible].

On the morning of June 17, 1933, [illegible]
Mueller learned that [illegible]
money to the First National [illegible]
that there remained on deposit $[illegible]
grand [illegible] of the county, [illegible]
money for the whole amount [illegible]
teller refused payment and called in [illegible]
who directed the teller to give Mueller [illegible]
securities. The teller then [illegible]
certain securities, [illegible]
appeared and ordered the [illegible]
bank. The check for $[illegible] was never [illegible]
is now in possession of its [illegible].
notified by the receiver to [illegible]

Several of the [illegible]
to the conversation with [illegible]
of the account. Their testimony is to the effect [illegible]
gave instructions to [illegible]
transferred to the First National Bank [illegible]
kept in the defendant bank as a [illegible]
balance. Hiesel, a [illegible]
whenever [illegible]

"Mr. Richlowski was supposed to draw a check and have the money transferred down to the First National Bank of Chicago." Riesel also said that the only time his attention was called to the fact that there was more than $500 in defendant bank was about a week before the bank closed; that at that time there was a meeting of the trustees at which Richlowski was present, and in response to questions he informed the trustees that while he did not know the exact amount, there was more than $500 in the account; that they then told him to make a transfer of the money and he said he would do so the same day, and he was again cautioned not to keep an amount of more than $500 in the account of defendant bank.

By stipulation of the parties it appears that at the close of business on June 17, 1932, the audit of the bank under the column marked "Resources" showed the following items:

"Cash on hand.....$2,861.06
Cash items..... 381.19
Exchange for clearings..... 1,373.19"

that its credit balances with other banks were as follows:

"Chase National Bank of New York... 2,189.07
The First National Bank of Chicago 1,157.82
Continental Illinois Bank and
Trust Company of Chicago.....26,512.43."

In behalf of respondent, Mr. Schultz testified that he had been a general man at the bank before it closed and was a bookkeeper for the receiver. He identified exhibits 1A, 1B, 1C and 1D as the commercial bookkeeper's ledger sheets of the closed bank, showing the account of petitioner. These records show an account kept in the usual way and that the money was taken out through checks drawn as provided for in the written authorization of July 27, 1931.

These are substantially the facts concerning which there does not seem to be any controversy. Petitioner argues that the testimony conclusively shows that the bank agreed to accept the deposits of the council for a specified purpose, namely, to

"Mr. Blomkwist was summoned to [illegible] transferred down to the [illegible] also said that the only time [illegible] fact that there was more than [illegible] week before the bank closed; [illegible] ing of the trustees of [illegible] spoke to [illegible] not know the exact amount, [illegible] count; that they [illegible] and he said as well [illegible] not to keep an amount of more than [illegible] bank.

By tabulation of the [illegible] of business on June 17, 1927, [illegible] column marked "Resources" [illegible]:

"Cash on hand.....
Cash items.....
Exchange for clearing.....

that its credit balances with other [illegible]:

"Checks [illegible]
the first National [illegible]
Continental [illegible]
First [illegible]

In be all of [illegible] been a general [illegible] for the receiver. [illegible] commercial bookkeeper's [illegible] the account of petitioner. [illegible] the usual way and that [illegible] as provided for in the written [illegible]

These are substantially the [illegible] does not seem to be any controversy. [illegible] testimony conclusively shows that [illegible] deposits of the council for a special purpose, namely, to

receive, cash and collect checks deposited with it by the council, and when the money received and collected was in excess of $500, to immediately transfer the excesssto the First National Bank, and that the legal effect of this agreement was to impress the funds in the bank with a trust in favor of the council. Petitioner cites Drovers' National Bank v. O'Hare, 119 Ill. 646; American Ex. Bank v. Mining Co., 165 Ill. 103; People v. Bates, 351 Ill. 439, and People v. Peoples Bank & Trust Co., 353 Ill. 479, all of which are to the effect that when a deposit of a special nature is made in a bank under such circumstances as to make the bank the agent or trustee of the depositor to carry out a particular purpose with the money, such fund thereby is constituted a trust fund and so long as it can be traced may be recovered in case the agency is not carried out according to instructions. Thus in People v. Peoples Bank & Trust Co., 353 Ill. 479, the court stated in effect that where a payee of a check placed it with a local bank for collection and the bank mailed it directly to the drawee bank with directions to remit, and the drawee bank, instead of remitting the money, sent to the local bank its draft on another bank (where, however, it had sufficient funds) but the drawee bank failed before the local bank was able to collect payment on the draft, the payee on the check was entitled to a preference over other creditors of the closed bank, upon the theory that the relationship created by the transaction was that of agency and the amount of the check should be regarded as impressed with a trust. So in People v. Bates, 351 Ill. 439, where it appeared that a bank had collected proceeds of a note in the sum of $4725 and the money was left in the bank for the purpose, as stated in a receipt, "to be invested in mortgage loans," it was held that the relationship created between the bank and the intervening petitioner was one of agency rather than debtor and creditor, and that petitioner was entitled to recover the amount

receive, cash may [illegible] counsel,
and such the money received [illegible]
immediately transfer the proceeds [illegible]
the legal effect of this [illegible]
bank when a trust in favor of [illegible]
Drovers' National Bank v. [illegible]
Mining Co., 180 Ill. [illegible]
v. People Bank & Trust [illegible]
effect that upon a deposit [illegible]
under such circumstances as [illegible]
of the depositor to carry out [illegible]
such fund thereby is consummated [illegible]
can be traced by [illegible]
out according to intention. [illegible] v. [illegible]
Trust Co., 233 Ill. 42, [illegible]
payee of a check placed in [illegible]
the bank credited it directly [illegible]
result, and the drawer [illegible]
the local bank its draft [illegible]
sufficient funds) [illegible]
was able to collect [illegible]
entitled to a preference [illegible]
upon the theory that the relationship [illegible]
was that of agency and the amount of the check [illegible]
as impressed with a trust. So in [illegible]
where it appeared that a check [illegible]
the sum of $4720.00 [illegible]
pose, as stated in a regular [illegible]
it was held that the relation [illegible]
the intervening petitioner [illegible]
creditor, and that petitioner was not [illegible]

of it as against the assets which the evidence showed had been augmented to the amount of this trust property.

The undoubted general rule is that the deposit of money in a bank creates the relationship of creditor and debtor between the depositor and the bank, and the undisputed facts in this redord do not bring this case within the exception illustrated by the cases cited in behalf of petitioner. Richlowski was at the time of this transaction the treasurer of petitioner, and the conference with reference to sending the funds in excess of $500 to the First National Bank was between him and the trustees of the council. The evidence does not disclose and would not justify the inference of any agreement between the bank and the council to that effect. The only agreement so far as the evidence disclosed was that implied by law that the bank would pay checks upon the account which were duly authorized. That was the only resolution of which the bank was informed up to a few days before it was closed. The proof shows merely the opening of a regular checking deposit account by the council acting through its officers. The bank did not have any right to make withdrawals from the bank nor transfer the funds except as checks were drawn by the duly authorized officers of the council. The account was handled as all other commercial accounts, and there was no special method provided for in connection with it. The funds deposited in the account were not kept separately from other funds, and there is nothing in the evidence which would overcome the presumption that by opening this account the relationship of debtor and creditor was established between the bank and the council. That is the presumption arising out of the transaction in the absence of a specific agreement to the contrary. Gits v. Foreman, 360 Ill. 461. We hold therefore that these funds were not impressed with a trust by reason of any special contractual relationship.

of it as against the assets which [illegible]
augmented to the amount of [illegible].

The unlimited general rule [illegible] in a bank creates the relationship of [illegible] the depositor and the bank, and [illegible] in [illegible] do not bring this case within the [illegible] cited in behalf of petitioner. [illegible] of the transaction the treasurer of petitioner, [illegible] reference to sending the funds in excess of [illegible] the First National Bank was between him and the [illegible]. The evidence does not disclose [illegible] of any agreement between the bank [illegible]. The only agreement so far as the evidence [illegible] plied by law that the bank would pay [illegible] were duly authorized. [illegible] bank was informed up to a few days before it [illegible]. The proof shows merely the opening of a regular account [illegible] the council acting through its officers. [illegible] right to make withdrawals from the bank [illegible] except as checks were drawn by the duly [illegible] council. The account was handled [illegible] and there was no special method provided for [illegible] The funds deposited in the account [illegible] other funds, and there is nothing in the [illegible] come the presumption that by opening [illegible] of debtor and creditor was [illegible] council. That is the presumption [illegible] the absence of a specific [illegible]. [illegible] Foreman, 350 Ill. 461. We [illegible] impressed with a trust by reason of [illegible] tionably.

In the next place, it is contended for petitioner that a trust relationship was created by the presentment of a check for the balance of the account and demand for payment thereon on the morning that the auditor of public accounts closed the bank, and there are cases which seem to so hold. Such is the rule stated obiter in the opinion in People v. Chicago Bank of Commerce, 275 Ill. App. 68, in which, however, two of the Judges declined to concur. The same court, when the precise question was presented to it, in the prior case of People v. Bryn Mawr State Bank, 273 Ill. App. 415, reviewed the authorities and held that the mere presentation of a check with demand for its payment did not create a trust ex maleficio, the Justice who wrote the opinion in People v. Chicago Bank of Commerce, dissenting. In the yet later case of People v. First Italian State Bank, 281 Ill. App. 1, the court said:

> "We are of the opinion that neither by the presentation of a check in person by the depositor, nor by a demand made through the presentation of a draft by a drawee bank upon a depositary bank and refusal to pay, is the amount segregated from the general fund or the deposited money made a trust fund separate and apart from the general assets."

One of the Justices again dissented.

In People v. O'Connell, 282 Ill. App. 155, in an opinion filed November 5, 1935, the second division of this court, reviewing the authorities, held that the drawing of a check and presentment of it with a refusal of the bank to pay, did not amount to a segregation of petitioner's deposit, nor amount to an augmentation of the assets of the bank, and that the relation between petitioner and the bank continued to be that of debtor and creditor. The statement in the opinion in People v. Chicago Bank of Commerce, 275 Ill. App.68, seems to have been to some extent based upon the opinion of the Supreme court in People v. Dennhardt, 354 Ill. 450. That case construed section 13 of the act of July 8, 1931, (Ill. State Bar Stats., chap. 16a, par. 37) which has since been held unconstitutional

In the most p[illegible] trust relationship has arisen [illegible] the balance of the accounts and [illegible] morning that the auditor of [illegible] there are cases which seem to [illegible] objet in the opinion in People [illegible] 172 Ill. App. 58, in which, on appeal, [illegible] consent. The same court, [illegible] to it, in the prior case of People [illegible] 171 Ill. App. 41, reviewed the [illegible] presentation of a check [illegible] a trust ex maleficio, the Justice who wrote the opinion in People v. Chicago Bank of Commerce, dissenting. In the prior case of People v. First Italian [illegible], [illegible] said:

> "We are of the opinion that [illegible] a check in person by the depositor, [illegible] the presentation of a draft by a stranger [illegible] bank and refused to pay, in the usual [illegible] fund or the deposited money [illegible] from the general assets."

One of the Justices [illegible]

In People v. [illegible], 227 Ill. [illegible] filed November 6, 1907, the second [illegible] the authorities, held that the [illegible] of it with a refusal of the bank [illegible] ation of petitioner's deposit, [illegible] assets of the bank, and that the resulting [illegible] bank continued to be trust of debtor and [illegible] the opinion in People v. Chicago [illegible] 58, seems to have been in some [illegible] Supreme court in People v. [illegible] strued section 12 of the act of July [illegible] ding. 108, par. 37) which has since been held [illegible]

and void by the Supreme court. People v. Union Bank & Trust Co., 362 Ill. 164. We therefore hold, on the authority of these cases, that no trust relationship was created by the presentation of the check as described in the evidence.

Moreover, even if we assume that either as a result of the original contract or by reason of the transactions including the drawing of the check which immediately preceded the closing of the bank, such trust fund was created, the evidence here is not sufficient to disclose such tracing and indentification of the fund as would entitle petitioner to a preference. Petitioner relies on People v. Bates, 351 Ill. 439, but that rule has been greatly modified in the later cases of People v. State Bank of Maywood, 354 Ill. 519, and Colegrove v. Gaupp, 357 Ill. 499, which cites People v. State Bank of Maywood. The opinion in the case of People v. State Bank of Maywood says:

> "Since the right to reclaim a trust fund is founded on the right of property, and not on the ground of compensation for its loss, the beneficiary must be able to point out the particular property into which the fund has been converted. When he is unable to do so, the trust fails and his claim becomes one for compensation only and stands on the same basis as the claims of general creditors."

Such, also, has been the view of this court as expressed in the comparatively recent cases of People v. First State Bank, 274 Ill. App. 46, and People v. Citizens State Bank, 274 Ill. App. 444, which it is believed are in harmony with the views of the Supreme court and the weight of authority. Bogert on Trusts and Trustees, vol. 4, secs. 921-930.

For these reasons the order is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

and void by the agreed court. People [illegible]

369 Ill. 151. We therefore [illegible]

that no trust relationship was [illegible]

check as described in the [illegible].

However, even if [illegible]

original contract [illegible]

drawing of the check [illegible]

back, such trust fund was created,

[illegible] to disclose such [illegible]

as would an idle [illegible]

on People v. Paine, 371 Ill. [illegible]

modified in the later cases [illegible]

394 Ill. 329, and Coleman v. [illegible], 407 Ill. [illegible], [illegible]

People v. State Bank of [illegible].

People v. State Bank of [illegible] said:

> "Since the right to [illegible] right of property, but not the [illegible] loss, the beneficiary must be able to [illegible] property into which the fund has been converted. [illegible] unable to do so, the trust [illegible] compensation only and should [illegible] general creditors."

Such, also, has been the view of [illegible]

comparatively recent cases of People [illegible] 346 Ill. App. 45, and People v. [illegible]

which it is believed [illegible]

court and the [illegible] of the [illegible]

vol. 4, sees. 921-926.

For these reasons [illegible]

Accordingly, [illegible] and [illegible] order.

38616

THE FIRST NATIONAL BANK OF HOBOKEN, a Corporation, Plaintiff (Appellant),

vs.

HELEN M. TOBIN and A. C. TOBIN, Defendants (Appellees).

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 582

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On June 1, 1933, plaintiff brought an action on a promissory note for $21,500, dated July 22, 1932, due 90 days after date, made by defendant Helen M. Tobin, the payment of it guaranteed by the other defendant, her husband, A. C. Tobin. The amount claimed to be due on the note was $19,255.25. Defendants admitted the balance due on the note as claimed, but filed a counterclaim in which they averred that plaintiff had attempted to sell the stock pledged as collateral to the note for a grossly inadequate price, and that if the stock had been sold at a fair price there would remain a considerable amount due defendants after the payment of the note. There was a jury trial. Defendant A. C. Tobin's name was on motion of plaintiff stricken from the counterclaim. There was a verdict and judgment in favor of defendant Helen M. Tobin on her counterclaim for $14,704.04, and plaintiff appeals.

The record discloses that plaintiff was a national bank conducting its banking business at Hoboken, N. J.; that the Elevator Supplies Company, Inc., was a New Jersey corporation conducting a manufacturing plant in Hoboken. Defendant Helen M. Tobin and her husband resided in Chicago. She owned 550 shares of the par value of $100 per share of the preferred stock of the Elevator Supplies Co., of which company her husband was a director. He was president of the General Fireproofing Co. of Illinois, a subsidiary of the General Fireproofing Co. of Youngstown, Ohio, and had been connected with the Chicago company for 28 years except for five years when he

38610

THE FIRST NATIONAL BANK OF
HORCHEN, a Corporation,
Plaintiff (Appellee),

vs.

HELEN M. WALSH and [illegible],
Defendants (Appellees).

28 31 A. 385

MR. JUSTICE O'DONNEL [illegible]

On June 1, 1925, [illegible]
note for $[illegible], dated July [illegible]
by defendant [illegible]
other defendant, her husband, [illegible]
due on the note was $10,[illegible]
due on the note as alleged, but [illegible]
averred that plaintiff had [illegible]
conditional to the note [illegible]
the alleged had been made at a [illegible]
stable amount due defendants after the [illegible]
was a jury trial. Defendants [illegible]
plaintiff stipulated [illegible]
judgment in favor of defendants [illegible]
for $14,706.04, and plaintiff appeals.

The record disclosed [illegible]
conducting the banking business [illegible]
Supplies Company, Inc., was a [illegible]
manufacturing plant in [illegible]
husband resided in Chicago. [illegible]
of $100 per share of the [illegible]
Co., of which company her husband was [illegible]
of the General Airconditioning [illegible]
General Airconditioning Co. of [illegible]
with the Chicago company for 20 years [illegible]

resided at Youngstown and was sales manager of the company. He became a director of the Elevator Supplies Co. in 1929, and represented Mrs. Tobin's interest in that company. He was elected the last time as a director of the Supplies company in October, 1932, for a year, and he testified that he had very intimate knowledge of the company's business because of his work with the major stockholders of the company in securing a new head for the company; that beginning January 1, 1930, he spent a great part of three months on the business of the company, and subsequently attended various directors' meetings, and that he was acquainted with the officers of plaintiff bank.

October 1, 1930, defendant Helen A. Tobin borrowed $25,000 from plaintiff bank, gave her collateral promissory note for that amount due four months after date, with interest at 5½% per annum, and pledged her 550 shares of stock in the Supplies Co. as collateral. Payment of the note was guaranteed by her husband, A. C. Tobin, the other defendant. The note was renewed from time to time at the request of defendants. The last renewal note, which is the one in suit, was dated July 22, 1932, due October 2[illegible], 1932, but it was not received by defendants until August 9, 1932. From the time the first note came due to October, 1932, plaintiff was almost continually pressing for payment and defendants asking for time. Defendants made payments aggregating $3500, together with interest on the note. Plaintiff refused to grant any other renewals, and after notice the stock was sold to plaintiff at auction by plaintiff's attorneys in Hoboken at $5 a share or $2,750. Credit was given on the note for this amount and the following June the instant suit was brought.

In its statement of claim filed June 1, 1933, plaintiff sued for the face of the note, or $21,500, less the $2,750, leaving a balance of $19,255.25, with interest thereon at 6% per annum from December 13, 1932, the date the stock was sold.

resided at Youngstown and was [illegible] of the company. He became a director of the Kenmore Building [illegible], in 1929, and remained [illegible]. Tobin's interest [illegible] last time as a director of the Kenmore [illegible], 1932, for a year, and he resigned [illegible] the company's business because of his [illegible] holders of the company in [illegible]; beginning January 1, 1931, [illegible] on the business of the company, [illegible] directors' meetings, and that [illegible] of plaintiff bank.

October 1, 1929, [illegible] from plaintiff bank, [illegible] amount due that month after [illegible], and stated for the notes at [illegible] payment of the note was [illegible] other defendants. The note was [illegible] quest of defendants. The last renewal [illegible] suit, was dated July 22, 1931, [illegible] received by defendants until August [illegible] first note came due in October, 1931, [illegible] nally arranging for payment [illegible] note made payments amounting [illegible] note. Plaintiff refused to grant [illegible] notice the stock was sold to [illegible] attorneys in Mahoning at $3 a share [illegible] the note for this amount and the [illegible] was brought.

In the statement of [illegible] sued for the face of the note, [illegible] leaving a balance of $19,[illegible]. [illegible] on the [illegible]

July 28, 1933, defendants filed an "affidavit of merits and set-off" in which they admitted there was a balance due on the note of $19,255.25, as claimed, but averred that if the stock had been fairly sold by plaintiff there would be a balance due defendants after the payment of the amount owed plaintiff, of $6494.75.

Defendants further averred that negotiations were carried on between the parties with reference to the making of the loan and the execution of the renewal notes and payments thereon; that the last note came due October 20, 1932, when the parties had further negotiations looking toward a further extension of time of payment; that on November 8, 1932, defendants offered to pay $200 on the principal and $322.50 interest in consideration of a further extension of 90 days; that plaintiff offered to grant a renewal for 60 days, which defendants did not accept, and on November 22, 1932, defendants received a letter from plaintiff's attorneys at Hoboken informing defendants they had the note for collection; that there was correspondence between the parties and defendants were advised that the stock would be sold at 10 a. m. December 13, 1932, unless the note was paid in full; that defendants advised plaintiff they were unable to pay the note at that time but offered to pay not less than $75 a month on the principal in addition to interest; that afterward plaintiff purported to have sold the stock on December 13, 1932, at $5 a share; that there was a total of 5266 shares of preferred stock of the Elevator Supplies company of the par value of $100 a share; that the stock "was closely held and was not listed on any exchange; ****" that it "was not traded in and no ready market" for it "existed at the time of said sale or at any time before or since;" that the stock was preferred as to assets on liquidation as well as to the earnings and that the total assets were $1,700,000 in excess of the total liabilities; that the book value of the stock exceeded $290 a share; that the Supplies company had actual cash on hand available

[illegible] and
net-off" in which they said [illegible] the note
of $10,[illegible], as claimed, [illegible]
Fairly said by [illegible]
after the payment of the [illegible]

Defendants first [illegible]
between the parties [illegible]
execution of the [illegible]
note came due [illegible]
[illegible]tions looking toward a [illegible]
on November 3, 1[illegible], defendants [illegible]
and $[illegible] to interest in some particular [illegible]
days; that materiality [illegible]
defends to it not accept, [illegible]
believe a jury from plaintiff's [illegible]
tendants they had the note [illegible]
performance between the parties [illegible]
stock would be sold at [illegible]
was said in full; that [illegible]
to pay the note at that time [illegible]
motion on the principal [illegible]
plaintiff supported to [illegible], at
$3 a share; that there [illegible]
of the bravator [illegible]
that the stock "was clearly [illegible]
said" that it "was not [illegible]
at the time of said [illegible]
stock was preferred [illegible]
earnings and that the [illegible]
total liabilities; that [illegible]
a share; that the [illegible] actual [illegible]

for the preferred stock in excess of $55 a share; that it was impossible to estimate the market value of the stock at the time of the sale or at any other time, but that the stock was worth in excess of $50 a share; that prior to the sale plaintiff published no notice of the sale and notified no one except defendants of its intention to sell the stock; that the sale was held in private and bid in by one of plaintiff's employees; that this was purely arbitrary and the price was less than one-tenth of the actual value of the stock; that defendants were not given time to find a buyer. And defendants prayed that they have judgment against plaintiff for $5494.75.

November 18, 1933, defendants filed an "affidavit of merits," admitting that the amount plaintiff claimed was due on the note; denied there was any bona fide sale of the stock and denied there was anything due plaintiff.

On March 7, 1934, plaintiff, by leave of court, filed an amended statement of claim, and it was ordered that defendants' affidavit of merits stand to the amended statement, leave was given defendants to file a set-off and to plaintiff to file an affidavit of merits thereto. On the same day plaintiff filed this amended statement of claim in which it claimed the face of the note, $21,500, but nothing was said about the sale of the collateral. On April 6, 1934, defendants filed their counterclaim in which they alleged there was due them from plaintiff over and above any sum due plaintiff from them, "the sum of $28,250 by reason of their counterclaim against plaintiff in the sum of $49,750.00, which is based upon the following allegations." Then follows a statement of the making of the original loan and note, the renewals, the pledging of the stock as collateral, the reduction of the principal by payments, leaving $21,500 the face of the last note, the negotiations between the parties in October, 1932, and subsequently defendants' offer to

for the preferred stock in excess of [illegible] was impossible to estimate the market value of the stock at the time of the sale or at any other time, but that the stock in excess of $250 a share; that prior to the sale plaintiff participated in notice of the sale and notified defendants that [illegible] intention to sell the stock; that defendants [illegible] bid in by one of plaintiff's employees; that this was done, arbitrary and the price was less than [illegible] the stock; that defendants were not [illegible] And defendants prayed that they have judgment [illegible] for $[illegible].

November 10, 1925, [illegible] merits," admitting that the amount [illegible] note; denied there was any [illegible] there was anything due plaintiff.

On March 7, 1926, plaintiff, by leave of court, [illegible] amended statement of claim, [illegible] affidavit of merits which [illegible] defendants to file a set-off and counterclaim [illegible] of merits therein. On the same day [illegible] statement of claim in which it alleged the [illegible] note, [illegible], but nothing was said about the [illegible] 1924, defendants filed their counterclaim [illegible] was due them from plaintiff over and above [illegible] from them, "the sum of $[illegible] by reason of [illegible] against plaintiff in the sum of $[illegible], [illegible] following allegations." [illegible] of the original loan and note, the [illegible] stock as collateral, the reduction of the principal by payments, leaving $[illegible] the face of the first note, the [illegible] between the parties in October, 1923, and subsequently defendants' offer to

pay $200 on the principal and interest of $322.50 in consideration of the renewal of 90 days from October 20, 1932; that plaintiff agreed to extend the note for 60 days but this was not acceptable to the defendants; that the parties had correspondence about the sale of the stock on December 13th; that defendants offered to pay not less than $75 a month on the principal and the interest; that on December 13, 1932, plaintiff held a private sale at the office of its attorneys in Hoboken, where the 550 shares of stock were purported to have been sold for $5 a share to one of plaintiff's employees, the proceeds of such sale being applied by plaintiff on the note, leaving a balance of $19,255.25. The counterclaim then set up the assets and liabilities of the Elevator Supplies Co.; that the stock had never been listed on any exchange, was closely held by a comparatively few individuals, and had always been infrequently traded in; that it was impossible to determine its exact market value on the date of the sale, or at any other date; that on the day of the sale it was fairly worth $55 a share; that for several years plaintiff was entirely familiar with the financial condition of the Elevator Supplies Co. by virtue of the banking of that company with plaintiff bank; that prior to the sale defendants had obtained several loans from plaintiff on the preferred and common stock; that plaintiff knew the names and addresses of the parties who held the controlling stock in the company; that prior to the sale plaintiff published no notice that the sale would take place on December 13th, and defendants were given no time to find a buyer; that plaintiff knew $5 a share was less than one-tenth of the actual value of the stock and knew that the price was far less than other interested parties would have paid had they known of the sale; that it was plaintiff's duty to deal fairly and honestly with defendants and obtain a fair price for the stock, but that it fraudulently and collusively sold the stock to one of its employees

pay $800 on the principal and interest of $[illegible]. In consideration of the renewal of 90 days from October [illegible], 1932; that [illegible] agreed to extend the note for 90 days but [illegible] to the defendants; that the parties had [illegible] sale of the stock on December [illegible]; [illegible] not less than $75 a month on the principal and the interest; that on December 15, 1932, plaintiff [illegible] of its attorneys in [illegible], where the [illegible] purported to have been sold for $5 a share to [illegible] employees, the proceeds of such sale being [illegible] the note, leaving a balance of $[illegible]; [illegible] not up the assets and liabilities of the Elevator Supplies Co.; that the stock had never been listed on any exchange, as clearly held by a comparatively few individuals, [illegible] frequently traded in; that it was impossible to [illegible] exact market value on the date of the sale, or [illegible]; that on the day of the sale it was [illegible]; that for several years plaintiff was [illegible] condition of the Elevator Supplies Co. by [illegible] that company with plaintiff bank; that [illegible] had obtained several loans from plaintiff [illegible] common stock; that plaintiff knew the [illegible] parties who held the conditional [illegible]; that prior to the suit plaintiff published [illegible] place on December 15th, and [illegible] buyer; that plaintiff knew $5 a share was [illegible] the actual value of the stock and [illegible] than other interested parties would [illegible] note; that it was plaintiff's duty, [illegible] defendants and obtain a fair price [illegible] fraudulently and collusively sold the stock to one of its employees

for $5 a share without advertisement or notice; that this sale constituted a conversion of the stock and plaintiff fraudulently sought to defraud defendants of the stock without crediting them with the proceeds of a bona fide sale of the stock; that by reason of such conversion defendants were entitled to recover from plaintiff actual damages of $37,000 with interest at 5% from December 13, 1932, and the further sum of $13,000 as punitive damages by reason of the fraudulent acts of plaintiff; and defendants prayed that judgment be entered in their favor and against plaintiff for $28,250.

May 5, 1934, plaintiff filed a reply to the counterclaim in which it denied that defendant A. C. Tobin had any interest in the stock, but averred that it was pledged by defendant Helen M. Tobin. Plaintiff further denied that the interest had been promptly paid by defendants; denied that the sale of the stock was at a private sale; denied that the assets and liabilities of the Elevator Supplies Co. were as alleged in the counterclaim and denied that the preferred stock was worth $50 to $55 a share. It further denied that plaintiff was entirely familiar with the financial condition of the Supplies company, and averred that it had made but one loan to the Supplies company in 1928; that the stock in question was sold pursuant to a power conferred in the collateral note which provided that in case of default the stock might be sold at public or private sale without notice or advertisement, and that plaintiff might become the purchaser at such sale; that plaintiff notified defendants on November 25th that the sale would take place December 13th, and the time and place were given; that the plaintiff also advertised the sale would be at public auction at a specified time and place and that the sale was so held.

Plaintiff further denied that it knew of anyone who would bid more for the stock than did plaintiff; denied the conversion of the

for $8 a share without adverse effect to nations; and this made consti-
tituted a conversion of the stock and plaintiff rightfully
sought to defraud defendants. The trial court granted defendants
with the proceeds of a bona fide sale of the stock; that by reason
of such conversion defendants were and had to recover from plain-
tiff actual damages of $97, and that the week of the December
13, 1928, and the further sum of $15, and an additional sum by
reason of the fraudulent acts of plaintiff; [illegible] that judgment
that judgment be entered in their favor and [illegible]
$96,000.

May 8, 1934, plaintiff [illegible] the [illegible]
in which it denied that defendant A. G. Tobin [illegible] interest in
the stock, but averred that it was [illegible]
Tobin. Plaintiff further denied that the [illegible]
promptly paid by defendants; denied [illegible]
at a private sale; denied that the sale [illegible]
Elevator Supplies Co. were [illegible]
ged that the predated check was [illegible]
further denied that plaintiff was [illegible]
nancial condition of the Sky Line Company, [illegible]
made but one loan to the Sky Line Company [illegible]
in question was paid pursuant [illegible]
note which provided that in case of default [illegible]
at public or private sale [illegible]
plaintiff might become the purchaser [illegible]
omitted defendants on November [illegible]
December 17th, and the time and place [illegible]
also advertised the sale [illegible]
time and place and that the [illegible]

Plaintiff further denied [illegible]
did more for the stock than did plaintiff; during the conversion of the

stock and denied all charges of misconduct, and plaintiff further replied in the alternative, that if the sale should be adjudged invalid for any reason, plaintiff still had the stock certificate in its possession and control and was at all times able to return the stock unimpaired to defendants, but that defendants, after notice of the intended sale and after the sale, never offered to pay the note or otherwise demanded the return of the stock.

Since defendants admitted that the amount claimed by plaintiff was due on the note, plaintiff on the trial of the case offered the note, computed the amount due, which was not disputed, and rested. Thereupon it was agreed by counsel that defendants would be given the opportunity to open and close the case.

The assistant cashier of plaintiff bank, called by defendants, testified he was employed by plaintiff bank; that it still had a corporate existence; that in December, 1934, the First National Bank of Jersey City purchased certain of the assets of plaintiff bank and assumed certain of its liabilities; that prior to that time, January, 1933, there was a reorganization of the plaintiff bank; and that the assets concerned in the instant suit still belonged to the plaintiff bank. This witness was later called by plaintiff and testified that he attended the sale of the collateral on December 13th, at 10 a. m., at the office of the bank's attorneys; that Mr. Smith, president of the Elevator Supplies Co., came to the plaintiff bank on that morning and went with the witness and the loan clerk of the bank to the attorney's office; that the attorney announced he would sell the 550 shares of stock, the certificate of which was produced; that the witness bid $1 a share; that thereupon Mr. Smith bid $2 a share, and witness in turn bid $5 a share; and there being no further bids, the stock was declared sold to witness for the bank; that a cashier's check for $2750 on plaintiff bank was handed over for the stock certificate. The evi-

stock and tendered all changes of size asked, [illegible] replied in the alternative, that if the [illegible] invalid for any reason, plaintiff still [illegible] in its possession and control and was at all times able to return the stock unimpaired to defendants, but that [illegible], after notice of the intended sale and after [illegible], refused to pay the note or otherwise [illegible] the [illegible].

Since defendants admitted that [illegible] by plaintiff was due on the note, plaintiff [illegible] the case offered the note, computed the amount due, [illegible] and rested. Thereupon it was agreed by counsel [illegible] would be given the opportunity to open [illegible].

The assistant cashier of plaintiff bank, called by defendants, testified he was employed by plaintiff bank; that [illegible] had a corporate existence; that in December, 1923, the First National Bank of Jersey City purchased certain of the assets of plaintiff bank and assumed certain of its liabilities; [illegible] time, January, 1923, there was a transfer [illegible] plaintiff bank; and that the assets concerned in the [illegible] belonged to the plaintiff bank. This witness was [illegible] by plaintiff and testified that he attended [illegible] on December 11th, at 10 a. m., at the [illegible] that Mr. Smith, president of the defendant [illegible] the plaintiff bank on that morning and [illegible] the loan clerk of the bank to the attorneys [illegible] the attorney announced he would sell the [illegible], the certificate of which was tendered; that [illegible]; that thereupon Mr. Smith did [illegible] ashore; and there being no further bids, [illegible] sold to witness for the bank; that a certificate [illegible] plaintiff bank was handed over for the stock certificate. The evi-

dence further shows that this was nothing more or less than a bookkeeping account with the plaintiff bank; that after the sale Mr. Smith walked back to the bank with the witness; that prior to that time Mr. Smith had called at the bank from time to time and that a few months prior to the sale he asked Smith how the Elevator Supplies Co.'s business was going and Smith replied that "it was still not operating in the black."

Smith, called by defendants, testified that he left the employ of the Elevator Supplies Co. about January 31, 1933, and at the time of the trial was vice-president of a New York corporation; that he was employed as general manager of the Supplies company about April, 1930, and in September of that year was elected president, which office he held until he left in 1933; that he was present at the sale of the collateral at the attorney's office in December 13th; that he went to the bank that morning and told Mr. Batchelder, the assistant cashier, that he was going over to the sale across the street; that after they got to the office the lawyer stated he was going to sell the 550 shares of stock to satisfy the note of Mr. and Mrs. Tobin and explained the terms of the sale and asked for bids; that Batchelder bid $1 a share, the witness then bid $2 a share, and Batchelder then bid $5 a share; and there being no further bids the stock was sold to Batchelder; that after the sale witness walked across the street with Mr. Batchelder, who asked witness what he meant by "double-crossing him"; that witness replied it was not a case of double-crossing, but he was shocked to see stock of such value being sold for so little; that about two weeks later he was at the bank and asked Batchelder what he would sell the stock for, and Batchelder replied, "For the amount of the note." The witness then gave testimony concerning the assets and liabilities of the Elevator Supplies Co., and a great many financial statements issued by that company are in the record. But we think

[illegible]

[illegible] stock since June, 1931; and [illegible] in 1932 the [illegible] plies company.

By the terms of the [illegible] authorized directly upon [illegible] or any part of said contracted [illegible] or at public or private [illegible] advertisement or notice [illegible] place of sale, [illegible] (such advertisement, [illegible] waived), and other [illegible] of the proceeds to pay [illegible] sale the said [illegible] may hold the same free [illegible] any claim of the [illegible] underlined will [illegible]."

Defendants offered [illegible] parties, writing in [illegible] Hilts were received without [illegible] payment from the bank to [illegible] requesting more [illegible] above date [illegible] loan in Chicago to [illegible] the money would be [illegible] plaintiff extended the time of payment, [illegible] the money in Chicago were unavailing; that after the date [illegible]

had negotiations with another concern in Chicago extending over another period of time by which they expected to get the money to pay the note, but this also fell through.

The correspondence further shows that some time afterward plaintiff was still pressing for payment, when defendants stated that Mrs. Tobin had an interest of more than $19,000 in real estate located near the University of Chicago; that plaintiff asked that this be turned over to it, but after some correspondence nothing was done in this matter.

Defendants were both given ten days notice in writing to pay the note or the collateral would be sold. Afterward they were each notified of the time and place of the sale. Plaintiff published on the 10th and 12th of December in a newspaper circulating in Hoboken a notice that the stock would be sold, giving the time and place. It was the duty of defendants to see that some one was present who would pay a fair price for the stock (if there were such a person or concern) (McDowell v. Chicago Steel Works, 124 Ill. 491) and apparently they had Smith, the president of the company, appear at the sale; but it is quite obvious that no one would buy the stock at the time of the sale because it was entirely too speculative. And we take judicial notice of the great depression at that time. (Strauss v. Chicago Title & Trust Co., 273 Ill. App. 63; Atchison, T. & S. F. Ry. Co. v. U. S., 284 U. S. 248; Morris Plan Bank of Richmond, Va. v. Henderson, 57 F. (2nd Ed.) 326.) There was practically no equity in any encumbered property, real or personal, at that time. Of course it was plaintiff's duty, regardless of the unlimited power given to it in the collateral note, to sell the collateral, and to act in the sale of it in the strictest good faith and fair dealing toward defendants. But it is obvious plaintiff did act with the utmost good faith. It had been pressing for nearly two years for payment of the note. The bank did not want

had negotiations [illegible] another chance. [illegible] very
another period of time [illegible] period. [illegible] to
pay the rate, but this time [illegible].

The correspondence [illegible] plaintiff was still [illegible] that Mr. [illegible] located near the University [illegible] this be turned over to it, [illegible] was done in [illegible].

[illegible] pay the rate or the [illegible] such notice at [illegible] on the [illegible] ion a [illegible] place. [illegible] out the [illegible] person or [illegible] and apparently [illegible] at the rate; [illegible] at the time of [illegible] And we [illegible] (Strong v. [illegible] I. [illegible] Hardwood [illegible] cality to [illegible] that time. [illegible] validated [illegible] collateral, [illegible] faith and [illegible] plaintiff did not [illegible] for nearly two years for payment of the note. The bank did not want

the collateral at any time at any price, and it is clear that it was willing to surrender it to defendants at any time upon payment of the indebtedness. In fact, this is specifically stated by counsel for defendants in his brief where he says, "We wish to point out that the Appellate (plaintiff) in this case has now abandoned the position it maintained throughout the trial that if its sale was invalid it wanted to tender the stock for the amount of the note." Defendants did not want the stock under these conditions, and, unfortunately, like many people at that time, were apparently unable to pay the note, and should not be permitted to compel the bank to pay for this speculative stock $14,000 in addition to the $22,000 due on the note, when the stock had no market and but very little, if any, speculative value. But one conclusion can be drawn from the evidence, and the court should have directed a verdict for the plaintiff at the close of the case, but not having done so, plaintiff's motion for judgment in its favor should have been allowed, notwithstanding the verdict.

The judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in plaintiff's favor for the amount of its claim.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

the collateral at any time on any notice, [illegible] it
was willing to surrender it to defendants at any time upon payment
of the indebtedness. In fact, this is [illegible] by
counsel for defendants in his final [illegible], for then to prove
out that the Appellate (Plaintiff) in this case [illegible] now
the position it maintained throughout the trial that [illegible]
was invalid it wanted to tender the stock and the money on the
note." Defendants did not make [illegible] contention,
and, unfortunately, like many people [illegible], were actually
unable to pay the note, and unable [illegible] to convert the
bank to pay for this speculative stock [illegible] to the
$25,000 due on the note, even the stock [illegible] was
very little, if any, speculative value. [illegible]
be drawn from the evidence, and the [illegible] a
verdict for the plaintiff in this [illegible]
having done so, plaintiff's [illegible]
should have been sustained, [illegible]

The judgment of the [illegible]
and the cause remanded with [illegible]
tiff's favor for the amount of the [illegible].

REVERSED AND REMANDED.

Scherrer, J., and Wilkerson, J., concur.

38656

GUS PLONSKER,
Appellant,

vs.

AL SIDER,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

3

285 I.A. 583

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 17, 1932, plaintiff caused judgment by confession to be entered on a promissory note for $500, dated August 14, 1928, due 90 days after date, payable to the order of the Chicago Lighting Fixture Co. and by it endorsed, against the maker, Al Sider. The judgment was for $711, being the face of the note with interest and $88.50 attorney's fees.

May 20, 1935, the court on motion of defendant opened up the judgment and gave him leave to defend. Defendant's affidavit in support of the motion was ordered to stand as an affidavit of merits. It set up that defendant learned on May 17, 1935, that judgment by confession had been entered against him; that defendant had paid the note to the payee, the Chicago Lighting Fixture Co., and had received the note from the payee at the time, but that the note was afterward lost or stolen and that plaintiff was not the owner of it; that October 20, 1932, three days after the judgment by confession was entered, plaintiff caused an execution to be issued, which was returned by the bailiff of the Municipal court November 12, 1932, the return showing defendant was not found and that the bailiff had found no property on which to satisfy the execution; that defendant had all the time resided in Chicago; that his residence was given in Chicago telephone directories and he could have been served with an execution had plaintiff desired to do so. June 13, 1935, the case was heard before the court without a jury, the court found the issues in favor of defendant, judgment was entered on the finding and plaintiff appeals.

28651.A.583

28653

DOB MORGAN,
Appellant,

vs.

AL SIXEN,
Appellee.

MR. JUSTICE [illegible] delivered the opinion of the court:

October 17, 1922, [illegible] to be entered on a preliminary order in [illegible], [illegible] 1922, due 30 days after date, [illegible] Lighting Fixture Co. and by it indorsed, [illegible] Elder. The judgment was for $[illegible], [illegible] interest and $[illegible] attorney's fees.

May 30, 1923, the [illegible] of [illegible] the judgment and gave him leave to defend. [illegible] in support of the motion was [illegible] merits. It set up that [illegible] judgment by confession [illegible] had paid the note to the [illegible] and had received the note [illegible] note was afterwards [illegible] owner of it; that October 3, 1921, [illegible] by confession was entered, [illegible] issued, which was returned [illegible] November 16, 1922, the [illegible] that the bailiff had [illegible] execution; that [illegible] all the [illegible] his residence was [illegible] have been served [illegible] June 13, 1923, the [illegible] the court found the issues [illegible] tered on the finding and plaintiff appeals.

Plaintiff contends that under the law the burden was on defendant to establish his defense of payment; that he failed to sustain this burden and the finding and judgment in defendant's favor is against the manifest weight of the evidence.

The question for decision is a question of fact to be determined from a consideration of all the evidence. Plaintiff offered the note in evidence and rested. Defendant called two witnesses, Jacob L. Salzman, former president and treasurer of the payee of the note, the Chicago Lighting Fixture Co., who testified that the note was paid to him by defendant. Defendant also testified that he paid the note to the payee. On the other side, Maurice J. Plonsker, brother of plaintiff, testified he paid the note to the payee at the request of the maker of the note, and that later on he gave the note to his brother, the plaintiff, in part payment for money he had borrowed from plaintiff.

The evidence further shows that Maurice J. Plonsker, the defendant Al Sider, and Alex G. Wolens were partners in the construction of a building and had purchased electrical fixtures and equipment for the building from the Chicago Lighting Fixture Co.; that the fixtures cost several thousand dollars, all of which was paid except $500 and that defendant, Al Sider, gave the note in question in payment of that balance, it being the amount remaining due from Al Sider as his part of the cost of the fixtures. Afterward the partnership was dissolved, there being some misunderstanding between Maurice J. Plonsker and the other two.

Sider testified that after this occurred, Maurice J. Plonsker asked for the file containing all papers in connection with the purchase of the electrical equipment from the Chicago Lighting Fixture Co., and that witness turned over the file which inadvertently contained the uncancelled note; that he took

[illegible] contends [illegible]
defendant to [illegible]
[illegible]
favor [illegible]

The [illegible]
determined from [illegible]
offered the [illegible]
witnesses. [illegible]
the [illegible]
testified that the [illegible]
also testified [illegible]
side, [illegible] However, [illegible]
paid [illegible]
note, [illegible]
plaintiff, [illegible]
tiff.

The [illegible]
defendant Al Miller, [illegible]
attention of [illegible]
equipment for [illegible]
that the fixtures [illegible]
said amount [illegible]
question in [illegible]
due from Al Miller [illegible]
ward the [illegible]
standing between [illegible]

Other testimony [illegible]
Pioneer [illegible]
with the purchase [illegible]
Lighting Fixture Co., [illegible]
which inadvertently [illegible]

a receipt from Plonsker for the file at the time, and he testified on the hearing that his attorney, who was then conducting the defense, had the receipt; his attorney thereupon replied that he did have such receipt; counsel for plaintiff then asked him if he would produce the receipt, but there was no response; the receipt was not produced and nothing further was said about it during the hearing.

Alex G. Wolens, called by defendant, testified that he delivered the note and records in the Chicago Lighting Fixture Co. files after the dissolution of the partnership to Maurice J. Plonsker and got a receipt for them from Plonsker. This receipt was not produced or accounted for, nor was the witness interrogated sufficiently on this point. Although counsel for plaintiff in his brief lays stress on the fact that the receipts were not produced, no reply is made to this point.

Salzman, called by defendant, testified that at the time in question he was president and treasurer of the payee of the note; that upon receiving the note he discounted it at his bank; that later defendant, the maker of the note, made a payment on account of the note, took up the old note and gave a new one for the balance, which he also discounted at the bank. He further testified that some time after the note was paid to him, Maurice J. Plonsker came to his office and asked him to make some sort of an endorsement on the note but that he refused to do so; that Plonsker said the note was paid. Just why such endorsement was necessary is not explained. He further testified that Plonsker said the note had been paid. The testimony of this witness is much confused.

Plonsker denied he had ever called at Salzman's office; denied he said the note was paid, and denied that he asked for an endorsement of the note by Salzman. He testified that he met Salzman on the street one day in September or October, 1932, and

a receipt from Plumacer for [illegible]
filed on the ground that his accuracy, [illegible]
the defense, had the receipt; his nephew [illegible]
he did have such receipt; [illegible]
he would produce the receipt, but [illegible]
receipt was not produced and [illegible]
during the hearing.

Alex W. Adams, called by [illegible]
delivered the note and receipt [illegible]
time after the transaction [illegible]
Plumacer [illegible] a receipt [illegible]
was not produced or looked for, [illegible]
small family on this point, although [illegible]
brief logy given of the fact that [illegible]
no reply is made to this point.

Salzman, called by [illegible]
question he was cross-examined [illegible]
that upon receiving the [illegible]
later defendant, the [illegible]
of the note, took [illegible]
which he also discounted at the bank. [illegible]
some time after the [illegible]
to his office and [illegible]
the note but [illegible] Plumacer [illegible]
was paid. That any [illegible]
He further testified [illegible]
testimony of his witness is more conclusive.

Plumacer denied [illegible]
denied he ever [illegible]
endorsement of the note by [illegible]
Salzman on the afternoon of May 19 [illegible] 1924, and

stated to Salzman that defendant, Sider, had not paid the note; that the witness had given the note to his brother, who had judgment confessed on it, and asked Salzman if he would be willing to come to court as a witness. Just why it would be necessary to require any witness we are unable to understand, and no explanation is made. The judgment had been entered on the note at that time and it was more than two years thereafter when defendant sought to open up the judgment. The witness Wolens was the uncle of Maurice J. Plonsker and at the time of the trial was still a partner of the defendant, Al Sider.

Maurice J. Plonsker further testified that on August 13, 1928, he gave his check to the Chicago Lighting Fixture Co. for $207.50, and the cancelled check is in the record; that this was in payment of $200 on account of the note and $7.50 for interest; that he afterward paid the balance, $300, but whether by check or cash he was unable to say. The testimony of this witness is also confused. If the original note was for $500, we are unable to understand why, after $200 was paid on it, the note in suit would be given for $500.

After a careful consideration of all the evidence in the record, much of which we have not discussed in this opinion, we are unable to say what the facts in the case are. In these circumstances we cannot say that the finding and judgment of the trial Judge, who saw and heard the witnesses testify, is against the manifest weight of the evidence.

For the reasons stated the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

stated to Watson that defendant, [illegible], had [illegible] the notes; that the witness had given the [illegible] money, [illegible] judgment contained a [illegible] to come to court as a witness. That they [illegible] to require any witness to [illegible] in made. The jury [illegible] it was more than the [illegible] up the judgment. The witness [illegible] Pioneer and [illegible] defendant, [illegible].

[illegible] 1920, he gave [illegible] 6207.50, and the [illegible] payment of $500 on [illegible] he afterward paid the balance, [illegible] he was unable to say. [illegible] lawed. If the original note [illegible] stand why, after $[illegible] given for $[illegible].

After a careful [illegible] record, much of which we have [illegible] unable to say what the [illegible] we cannot say that the finding [illegible] saw and heard the witnesses testify, [illegible] of the evidence.

For the reasons stated the judgment [illegible] of Chicago is affirmed.

[illegible].

McSurely, P. J., and Matchett, J., concur.

38716

LOUIS COHEN,
Plaintiff,

vs.

MAX KIRCHHEIMER and KIRCHHEIMER BROS. CO.,
Defendants.

M. C. LIVINGSTON and LEO T. KAUFMAN, Doing Business as LIVINGSTON & KAUFMAN,
Petitioners- Appellants,

vs.

MAX KIRCHHEIMER and KIRCHHEIMER BROS. CO. and FRANK WEBB,
Respondents-Appellees.

B2

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

285 I.A. 583

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Livingston and Kaufman, attorneys, filed their petition in a personal injury case, praying that they be awarded an attorney's lien under the provisions of Par. 13, Chap. 13, Ill. State Bar Stats. 1935. The defendants in the personal injury case filed their answer, denying that petitioners were entitled to a lien. The matter was heard before the court, without a jury, who found against petitioners, dismissed their petition, and they appeal.

Both parties agree that the question involved on the hearing and in this court is a question of fact, and that the trial Judge having found in favor of the defendants this courtis not warranted in disturbing such finding unless it is against the manifest weight of the evidence. With this we agree. Both parties further agree, as stated by counsel for defendants, that "The only point in dispute in the case before this court is: Did Louis Cohen ever ratify the contract which his wife, Fannie Cohen, signed on his behalf, purporting to employ Attorney Leo Kaufman in a personal injury case?"

The record discloses that plaintiff, Louis Cohen, was

38716

LOUIS COHEN,
Plaintiff,

vs.

MAX KIRCHHEIMER and KIRCHHEIMER BROS. CO.,
Defendants.

M. O. LIVINGSTON and MRS. T. [illegible],
Doing Business as LIVINGSTON & [illegible],
Petitioners-Appellants,

vs.

MAX KIRCHHEIMER and KIRCHHEIMER BROS. CO. and MAX. [illegible],
Respondents-Appellees.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Livingston and [illegible], attorneys, [illegible] in a personal injury case, praying that [illegible] lien under the provisions of Par. 1, [illegible], [illegible] State, 1935. The defendants in the proceeding [illegible] their answer, denying that petitioners were entitled to a lien. The matter was heard before the court, [illegible], and found against petitioners, dismissed their petition, [illegible].

Both parties [illegible] that the [illegible] and in this court is a question of fact, [illegible] having found in favor of the defendants [illegible] in disturbing such finding unless it [illegible] of the evidence. [illegible], as stated by counsel for [illegible], [illegible] dispute in the case before this court is: [illegible] the contract which [illegible], [illegible] purporting to employ Attorney [illegible] case?"

The record discloses that [illegible], while [illegible], was

injured in an automobile accident on July 14, 1933, which he claimed was caused by the negligence of defendants. The petitioners' contention is that on the next day plaintiff, by his wife, Fannie Cohen, signed a written agreement by which Cohen purported to employ Livingston and Kaufman to represent him in his claim for personal injuries, and for which services he was to pay them 40% of any amount recovered; that six days thereafter, July 21, 1933, Kaufman saw plaintiff Cohen, explained to him that his wife had signed a written agreement of employment as above stated, and that Cohen ratified and confirmed the agreement.

Defendants' position is that Fannie Cohen had no authority to sign the agreement on behalf of her husband; that it was not ratified by Louis Cohen; that on or about July 29th Cohen expressly repudiated the document signed by his wife, and employed attorneys McKenna, Harris and Schneider to represent him in the personal injury claim, for which he agreed to pay them 33 1/3 per cent of the amount recovered; that afterward these attorneys brought suit on behalf of Cohen against defendants to recover for the personal injuries; that when the case was about to be tried it was settled by defendants paying $3250.

When the matter came on for hearing before the court petitioners' counsel called Kaufman to the stand and proceeded to interrogate him as to what was said by the witness and Cohen on July 21st which tended to show a ratification of the written document signed by Cohen's wife. Counsel for defendants objected on the ground that the petitioner, Kaufman, was endeavoring to establish "agency by testimony of the agent." This objection was erroneously sustained. The evidence was entirely proper; the question of agency was in no way involved. Petitioner was endeavoring to show by direct testimony as to the conversation between himself and Cohen, that the contract of employment signed in behalf of Cohen by his

injured in an automobile accident on July 14, 1933, which he claimed was caused by the negligence of defendants. The petitioners' contention is that on the next day plaintiff, by [illegible], Louis Cohen, signed a written agreement by which Cohen purported to employ Livingston and Kaufman to represent him in his claim for personal injuries, and for their services he [illegible] of the amount recovered; that six days [illegible], July [illegible], [illegible] saw plaintiff Cohen, explained to him that his [illegible] signed a written agreement of employment as above stated, and he then ratified and confirmed the agreement.

Defendants' position is that [illegible] authority to sign the agreement on behalf of her husband; that it was not ratified by Louis Cohen; that on or about July 20th Cohen expressly repudiated the document signed by his wife, and employed attorneys McKenna, Harris and Schmeiler to represent him in the personal injury claim, for which he agreed to pay them 33 1/3 per cent of the amount recovered; that afterward these attorneys [illegible] on behalf of Cohen against defendants to recover for the personal injuries; that when the case was about to be tried it was settled by defendants paying $[illegible].

When the matter came on for hearing before the court petitioners' counsel called Kaufman to the stand and proceeded to interrogate him as to what was said by the [illegible] July 21st which tended to show a ratification of the written document signed by Cohen's wife. Counsel for defendants objected on the ground that the petitioner, Kaufman, was endeavoring to establish "agency by testimony of the agent." This objection was [illegible] sustained. The evidence was entirely proper; the question of agency was in no way involved. Petitioner was entitled to show by direct testimony as to the conversation between himself and Cohen, that the contract of employment signed in behalf of Cohen by his

wife was ratified by Cohen. Later this testimony was admitted. The witness testified that shortly before the accident he had some business dealings with Mrs. Cohen; that on July 15th, the day after the accident, he went to the police station with Mrs. Cohen and a Mrs. Goldman, at which time he wrote out the contract of employment which was signed by Mrs. Cohen on behalf of her husband; that on July 21st he and Mrs. Cohen went to the hospital to see Cohen; that he then told Cohen his wife had signed a contract employing Kaufman and his partner, Livingston, to represent him in the personal injury case, for which they were to receive 40% of any amount recovered; that he told Cohen he had the contract with him, and Cohen replied his wife had told him she had signed the contract, that it was all right, and for petitioners to go ahead and work on the case and do the best they could. The witness further testified that at that time he showed Cohen the written statements of two witnesses which he had secured and which were in Cohen's favor concerning the accident; that he had secured the names of two other witnesses and was continuing his investigation of the case; that at that time Cohen was in bed with a bandage on his head; that Cohen told him to keep on working on the case and do the best he could. There is also in evidence an itemized statement of the services performed by petitioners beginning on July 15th and ending September 8th, on which date petitioners received a letter from Cohen in which it was stated that Cohen's wife had no authority to sign the contract purporting to employ petitioners to represent him in the personal injury case, and that he did not desire petitioners' services any longer.

The evidence further shows that this letter was dictated by Mr. Harris in the office of McKenna, Harris & Schneider, and mailed to petitioners.

Cohen, called by petitioners, testified that about five days

wife was testified by Cohen. Later this testimony was stricken.
The witness testified that shortly before the accident [illegible]
business dealings with Mrs. Cohen; also on July 1 [illegible]. After
the accident, he went to the police station with Mrs. Cohen and
Mrs. Goldman, at which time he wrote out the contents of the agreement
which was signed by Mrs. Cohen on behalf of her husband; that on
July 21st he and Mrs. Cohen went to the hospital to see Cohen; that
he then told Cohen his wife had signed a contract [illegible] between
and his partner, Livingston, to represent [illegible] in-
jury case, for which they were to receive [illegible] of any amount re-
covered; that he told Cohen he had [illegible] contract [illegible], and
Cohen replied his wife had told him she had signed the contract,
that it was all right, and for petitioners to go ahead and work on
the case and do the best they could. [illegible] testified
that at that time he showed Cohen the written [illegible] of two
witnesses which he had secured and which were in [illegible] never
concerning the accident; that he had [illegible] of two
other witnesses and was continuing his investigation of the case;
that at that time Cohen was in bed with a [illegible] on his head;
that Cohen told him to keep on working on the case and do the best
he could. There is also in evidence an itemized statement of the
services performed by petitioners [illegible] and
ending September 8th, on which date petitioners received a letter
from Cohen in which it was stated that [illegible] to au-
thority to sign the contract purporting to empower petitioners to
represent him in the personal injury case, and that he did not
desire petitioners' services any longer.

The evidence further shows that this letter was dictated by
Mr. Harris in the office of Mr. [illegible], Cohen's [illegible], and
mailed to petitioners.

Cohen, called by petitioners, testified that about five days

after the accident Mrs. Cohen and Kaufman called at the hospital where he was confined to his bed; that they talked about petitioners' employment and the contract signed by his wife; the witness corroborated the testimony of Kaufman to the effect that his wife had signed the contract of employment and that he had said it was all right. On cross-examination he testified that before the accident he did not know the law firm of McKenna, Harris & Schneider; that he first saw them about six weeks after the accident at their office, where he went pursuant to a call from them; that about July 29th a Mr. Merkin, together with Cohen's cousin, came to the hospital and Merkin presented a contract, which Cohen signed, employing McKenna, Harris & Schneider as his attorneys to represent him in the personal injury case, for which Cohen agreed to pay them 33 1/3 per cent of the amount recovered; that Merkin was sent over by McKenna, Harris & Schneider; that afterward, on September 7th, pursuant to a call from the office of McKenna, Harris & Schneider, Cohen went to their office where he signed a letter dictated by Mr. Harris, addressed to the petitioners, advising that he did not want their services longer; that before he signed the letter he told the attorneys he already had a contract with Mr. Kaufman and that they told him Kaufman should not have anything further to do with the case, to which he agreed; that his wife was present at the time and she also signed the letter; he denied that he had said, as the letter purported, that his wife had no authority to sign the contract employing Kaufman; that he never read the letter; that afterward McKenna, Harris & Schneider filed his suit to recover for the personal injuries, and when the case came up for trial Mr. McKenna was representing him and Kaufman was not there; that he had no further dealings with Kaufman after he signed the letter of September 7th. He further testified that at the time Merkin and his cousin came to the hospital, about two

after the accident Mrs. Cohen and Kaufman called at the hospital where he was confined to his bed; that they talked about litigation employment and the contract signed by his wife; he witness corroborated the testimony of Kaufman to the effect that his wife had signed the contract of employment and that he had said it was all right. On cross-examination he modified that before the accident he did not know the law firm of Harris & Schneider; that he first saw them about six weeks after the accident at their office, where he went pursuant to a call from them; that about July 29th Mr. Merkin, together with Cohen's cousin, came to the hospital and Merkin presented a contract, which Cohen signed, employing Harris & Schneider as his attorneys to represent him in the personal injury case, for which Cohen agreed to pay them 33 1/3 per cent of the amount recovered; that Merkin was sent over by Harris & Schneider; that afterward, on September 7th, pursuant to a call from the office of Harris, Harris & Schneider, Cohen went to their office where he signed a letter dictated by Mr. Harris, addressed to the petitioner, advising that he did not want their services longer; that before he signed the letter he told the attorneys already a contract with Mr. Kaufman and that they told him Kaufman should not have anything further to do with the case. He also testified; that his wife was present at the time and she also signed the letter; he denied that he had said, as the letter stipulated, that his wife had no authority to sign the contract employing Kaufman; that he never read the letter; that afterward Harris & Schneider filed his suit to recover for the personal injuries, and when the case came up for trial Mr. Kaufman was representing him and Kaufman was not there; that he had no further dealings with Kaufman after he signed the letter of September 7th. He further testified that at the time Merkin and his cousin came to the hospital, about two

weeks after the accident, his cousin introduced him to Merkin and said Merkin represented Mr. McKenna's office; that they were "the biggest lawyers;" that witness then stated he already had a lawyer, Mr. Kaufman, and Merkin then asked him how much he was to pay, and he replied 40%; that Merkin said they charged too much, that "We got the best lawyers and we will charge you only 33%; we will get you a lot of money - about $50,000;" that he then signed the contract employing Mr. McKenna and his firm; that he told them his wife had signed a contract before that time employing Mr. Kaufman and that witness had said it was all right, that his wife did right in signing it; that thereupon Merkin asked him, "Did you sign it?" that witness replied, "No;" that Merkin then said, "Well, then, it is all right, we will take care of it."

The evidence further shows that on August 2nd, 1933, petitioners sent a notice of attorneys' lien to defendants and it was admitted on the hearing that the notice was received by defendants on the following day.

Defendants called attorneys McKenna, Harris, and Gerhhon, one of their associates. McKenna testified that he had a conversation with Mr. Harris about some other attorney who was supposed to have something to do with the case; that afterward Cohen was in their offices and stated he did not want the other attorney; that there was a conversation about the contract signed by Cohen's wife; that Cohen said she had no business to sign the contract; that he did not want that lawyer to represent him; that then a letter was dictated by Mr. Harris, addressed to Kaufman, which Cohen and his wife signed, advising Kaufman that his services were no longer needed. The witness testified that afterward he started to try the personal injury case, when the matter was settled. On cross-examination he testified that the Cohen case came into his office through a cousin of Cohen's whose name he did not recall.

weeks after the accident, his counsel introduced him to Martin and said Martin represented Mr. McCarty's interests; that they were "the biggest lawyers;" that [illegible] Mr. Kaufman, and Martin then asked him how much [illegible], and he replied 40%; that Martin said [illegible] "We got the best lawyers and we will manage you only 33%; we will get you a lot of money - about [illegible]." That [illegible] contract employing Mr. Kaufman and his firm; [illegible] his wife had signed a contract [illegible] and that witness had said it was all right, that his wife did right in signing it; that thereupon Martin said [illegible], "Will you sign it?" that witness replied, "No;" that Martin then said, "Well, then, it is all right, we will take care of it."

The evidence further shows that on August [illegible], petitioners sent a notice of attorneys' lien to [illegible] and it was admitted on the hearing that the notice was received by defendants on the following day.

Defendants called attorneys [illegible], Mr. Martin, one of their associates. Each one testified that he had a conversation with Mr. Harris about some other attorney who was supposed to have something to do with the case; that Martin's office was in their offices and stated he is not [illegible] attorney; that there was a conversation about the contract signed by Cohen's wife; that Cohen said she had no business to sign the contract; that [illegible] did not want that lawyer to represent him; that [illegible] was dictated by Mr. Harris, addressed to Martin, which Cohen and his wife signed, advising Martin that his services were no longer needed. The witness testified that [illegible] and he started to try the personal injury case, when the latter was settled. On cross-examination he testified that the Cohen case came into his office through a cousin of Cohen's whose name he did not recall.

Attorney Harris, called by defendants, testified he was a member of the firm that represented Cohen in the personal injury case; that prior to September 7, 1933, when the letter was prepared in their office, signed by Cohen and his wife and mailed to Kaufman, he had several calls from Kaufman in which Kaufman advised witness he was representing Cohen in the personal injury suit; that witness said his firm represented Cohen in the case, and if Cohen didn't want them they would withdraw; that Kaufman replied he didn't want that, but if they would give him part of the fee it would be all right for Harris's firm to proceed with the trial; that witness replied he was not interested in that proposition; that afterward, on September 7th, Cohen and his wife came to the office at his request, and that he dictated the letter to Kaufman advising him that his services were no longer needed, and had Cohen and his wife sign it and mail it to Kaufman; that at the time of the preparation of the letter Cohen said Kaufman didn't represent him; that thereupon Mrs. Cohen spoke up and said she had signed a contract, and then Cohen and his wife said they didn't want Kaufman in the case any more, and thereupon witness dictated the letter; that at that time Cohen said he never employed Kaufman and that his wife had no right to sign his name to the contract.

On cross-examination Harris testified he didn't know that Kaufman and Livingston had filed a notice of lien on defendants in the personal injury case; that Kaufman never told him he had given any such notice; that he knew Merkin, but Merkin didn't work for their firm; that he brought the case into their office; that he had known Merkin for several years and he came into their office now and then. He denied that he had a conversation with Kaufman in which the latter told him he was going to insist on his lien.

Louis Gershon, the attorney associated with McKenna's firm, called by defendants, testified that he was present at the

Attorney Harris, called by defendants, testified he was a member of the firm that represented Cohen in the personal injury case; that prior to September 7, 1932, when the letter was prepared in their office, signed by Cohen and his wife and mailed to Kaufman, he had several calls from Kaufman in which Kaufman advised witness he was representing Cohen in the personal injury suit; that witness said his firm represented Cohen in [illegible], and if Cohen didn't want them they would withdraw; that Kaufman replied he didn't want that, but if they would give him part of the fee it would be all right for Harris's firm to proceed with the trial; that witness replied he was not interested in that proposition; that afterward, on September 7th, Cohen came into the office at his request, and then he also had a talk with Kaufman advising him that his services were no longer needed, and that Cohen and his wife sign it and mail it to Kaufman; that at the time of the preparation of the letter Cohen [illegible] represent him; that thereafter Mrs. Cohen came in [illegible] and signed a contract, and then Cohen and his wife [illegible] want Kaufman in the case any more, and therefore [illegible] the letter; that at that time Cohen [illegible] employed Kaufman and that his wife had no right to sign his [illegible] contract.

On cross-examination Harris testified [illegible] know that Kaufman and Livingston had filed a notice of lien on [illegible] in the personal injury case; that Kaufman never [illegible] had given any such notice; that he knew Kaufman, [illegible] work for their firm; that he brought the case into [illegible]; that he had known Kaufman for several years [illegible] office now and then. He denied that he had a conversation with Kaufman in which the latter told him he was going to [illegible] a lien.

Louis Gerson, the attorney associated with Kaufman's firm, called by defendants, testified that he was present at the

time Mr. Harris dictated the letter for the Cohens to sign; that at that time Mr. Harris asked Cohen if Kaufman was his lawyer and that Cohen said, "No;" that he didn't sign any contract. Mr. Harris said, "Mr. Kaufman called me up and represented that he had a contract." Cohen replied that Kaufman was not his lawyer, saying, "Your firm is my lawyer, you represent me;" that then the letter was prepared; that at that time Cohen said his wife had no right to sign the contract.

In rebuttal Kaufman was called by petitioners and testified that Mr. Harris had called him to his office about the middle of August, and "I told Mr. Harris I had a contract signed by Mrs. Cohen and that after the contract was signed I showed it to Mr. Cohen at the hospital;" that "Cohen said he would pay me 40%; that whatever his wife did was all right;" that "Your Mr. Merkin" went to the hospital and told Cohen he would handle the case for 30% instead of 40%; that Mr. Harris then said he didn't want a case where the parties had some other lawyer, but that "Mr. Cohen insisted and he came down on July 29th and signed this contract;" that witness said, "Mr. Cohen is now in the hospital and he couldn't come down * * * on July 29th * * *;" that Mr. Harris said, "Mr. Merkin has brought into our office a lot of cases in the last few years," and "We have got to pay Merkin out of this case;" that "we will pay you for the services you have rendered;" that witness told Mr. Harris he was going to insist on their lien, etc.

A client cannot, by discharging his attorney except for good cause, deprive him of his lien. Tulka v. Chicago City Ry.Co., 259 Ill. App. 234. Under the Attorney's Lien Act, service of notice claiming a lien has the same effect as an assignment to the attorney of an interest in any judgment that may be rendered, or in the proceeds of any settlement that may be made by the debtor with the client, and is such an assignment as the debtor is bound to

time Mr. Harris dictated one letter [illegible] to sign; but at that time Mr. Harris asked Cohen if [illegible] lawyer and that Cohen said, "No;" that [illegible]. Mr. Harris said, "Mr. Lautman, [illegible] and [illegible] a contract." Cohen replied that [illegible], saying, "Your firm is my lawyer, you represent me;" that the letter was prepared; that at that time Cohen [illegible] right to sign the contract.

In rebuttal Kaufman [illegible] testified that Mr. Harris had called him [illegible] of August, and "I told Mr. Harris [illegible] Cohen and that after the [illegible] Cohen at the hospital;" that "[illegible]; that whatever his wife [illegible]" that "[illegible]" went to the hospital and said [illegible] for 30% instead of 40%; that Mr. Harris [illegible] case where the parties had [illegible] Mr. Cohen insisted and [illegible] contract;" that witness said, "Mr. Cohen is not [illegible] he couldn't come down [illegible]" that Mr. Harris said, "Mr. Martin has [illegible] in the last few years," and "[illegible]" that witness; that "we will pay you for the services you [illegible]; that witness told Mr. Harris he was [illegible] to [illegible], etc.

A client cannot, by [illegible] for good cause, deprive his of his lien. [illegible] 299 Ill. App. 234. Under the [illegible] or notice claiming a lien [illegible] to the attorney of an interest in any [illegible], or in the proceeds of any settlement that may be made by the debtor with the client, and is such an assignment as the debtor is bound to

respect. Baker v. Baker, 258 Ill. 418. Where a person employs a lawyer and agrees to give him part of the proceeds recovered for the services rendered, and the defendant is notified of this fact by the attorney, if the defendant afterward settles with the client, he will be required to pay the attorney in accordance with the terms of the contract between the attorney and his client. Smith v. American Bridge Co., 194 Ill. App. 500.

The evidence in the case is that the day after the accident, July 15th, Kaufman prepared the written agreement which was signed for Cohen by Mrs. Cohen and which purported to employ Kaufman and his associate to represent Cohen in the personal injury case, for which he was to be paid 40%. Kaufman and Cohen both testified that Kaufman on July 21st explained the contract to Cohen and told him it had been signed in Cohen's name by his wife; that Cohen said the contract was all right and for Kaufman to go ahead with the case; that Kaufman began work in the preparation of the case on the day after the accident and rendered considerable service in the preparation of it; that August 2nd Kaufman sent a notice to defendants advising them of his employment by Cohen and the terms thereof;- that about July 29th Kaufman entered into another agreement employing another firm of attorneys to represent him for one-third of the amount received, which should be paid by defendants in the matter, and the second firm of attorneys likewise notified the defendants of their claim for a lien, but apparently defendants paid no attention to the notice, which they admitted receiving from Kaufman, and no explanation is here made why it was ignored.

The evidence that Cohen did not ratify the contract signed by his wife is based on the testimony of the three attorneys who represented Cohen in the personal injury suit, that Cohen told them Mrs. Cohen had no authority to sign the contract with Kaufman. Merkin, who procured Cohen's signature to the later contract, was

respect. Baker v. Baker, 258 Ill. 416. Where a person employs a lawyer and agrees to give him part of the proceeds recovered for the services rendered, and the date set is modified of this fact by the attorney, if the defendant with reasonable diligence, he will be required to pay the attorney in accordance with the terms of the contract between the attorney and the client. Smith v. American Bridge Co., 164 Ill. App. 527.

The evidence in the case is that the day after the accident, July 15th, Kaufman presented the written agreement [illegible] signed for Cohen by Mrs. Cohen and which purported to [illegible] Kaufman and his associate to represent Cohen in the matter. I [illegible] case, for which he was to be paid 40%. Kaufman and Cohen [illegible] testified that Kaufman on July 21st [illegible] Cohen and told him it had been signed in Cohen's [illegible] said the contract was all right, but for Kaufman [illegible] the case; that Kaufman [illegible] on the day after the accident and [illegible] in the prosecution of it; that [illegible] notice to determine advising [illegible] and the terms thereof; that about July [illegible] employing another firm of attorneys to prosecute the [illegible] of the amount received, which [illegible] matter, and the second firm of attorneys [illegible] defendants of their claim for a lien, [illegible] no attention to the notice, and [illegible] from Kaufman, and no explanation is ever made why it was ignored.

The evidence that Cohen did not [illegible] signed by his wife is based on the testimony of the [illegible] who represented Cohen in the personal injury suit, that Cohen told them Mrs. Cohen had no authority to sign the contract with Kaufman. Merkin, who procured Cohen's signature to the later contract, was

not called. Cohen denies he made such statement. Even if he did state to the attorneys that his wife had no authority to sign the contract for him, this would not be conclusive that he had not done so because very little credence could be placed on anything he might say. But we think the manifest weight of the evidence is that Cohen ratified the contract signed by his wife; therefore the finding and judgment of the Superior court is reversed and judgment will be entered in this courtin favor of the petitioners and against the defendants for 40 per cent of $3250, the amount of the settlement, which is $1300.

The judgment of the Superior court of Cook county is reversed and judgment entered in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

McSurely, P. J., and Matchett, J., concur.

not called. Cohen denies the judge [illegible] ment. We [illegible] id state to the attorneys that his [illegible] to [illegible] contract for him, this would not be [illegible] done so because very little [illegible] he might say. But we do [illegible] is that Cohen rectified [illegible] the finding and judgment of the [illegible] judgment will be entered [illegible] and against the defendants for [illegible] the settlement, which is [illegible].

The judgment of the [illegible] is reversed and judgment entered in this court.

[illegible]

McSurely, P. J., and [illegible], J., concur.

38727

THE FIRST UNION TRUST & SAVINGS BANK, as Executor of the Estate of HERMAN W. MALLEN, deceased,
Appellee,

vs.

CHARLES STOLOF et al., Defendants.

H. AUSTIN, doing business as ERNEST SCOTT & COMPANY, Intervenor,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

285 I.A. 583

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In a foreclosure suit, after the cause was referred to a master in chancery, H. Austin, doing business as Ernest Scott & Co., who will hereinafter be referred to as the defendant, by leave of court filed an intervening petition claiming that he had sold to Louis A. Albert, and installed in the building in foreclosure "one 1000 (one thousand) gallon per hour 'Scott' Solvent Vacuum Distilling plant" for $8900, on which he had been paid $4005, leaving a balance due of $4895; that by the terms of the written contract for the sale and installation of the distilling plant, it remained the property of the seller until fully paid for; that since the plant had not been fully paid for, the defendant was entitled to remove it from the building, and the prayer of the petition was that he be permitted to remove the plant. The matter was referred to the master with directions that he make up a separate report; he heard the evidence, made up his report, found the sale of the plant was an absolute and not a conditional sale, and recommended that the intervening petition be dismissed. The master overruled defendant's objections to the report, they were ordered to stand as exceptions, and an order was entered overruling the exceptions, approving the master's report, and the intervening petition was dismissed. Defendant appeals.

The question for decision turns upon the construction of

THE JIMMY DUNCAN COMPANY & AVIAN MANA, as Receiver of the Estate of EDWARD F. MALLORY, Deceased,
Appellees,

vs.

CHARLES STOLOV et al.,
Appellees.

G. AUSTIN, doing business as [illegible] BOOTY & CONTRY, Intervenor,
Appellant.

[illegible]

[illegible]

[illegible]

the written contract for the purchase and sale and installation of the distilling plant. The contract is dated July 19, 1929, between Louis A. Albert "or his nominee" designated as the "Purchasers" and "Ernest Scott & Co." designated as the "Contractors", and the material parts are as follows: "The Purchasers undertake to Purchase and the Contractors undertake to furnish to the Purchasers, one 1000 (one thousand) gallon per hour 'Scott' Solvent Vacuum Distilling Plant further described in the attached letter dated July 19, 1929, to Mr. L. A. Albert * * * For same Purchasers are to pay the Contractors the sum of $3900.00 * * * delivered and erected on Purchasers' foundations in Purchasers' building at Chicago, Ill." Then follow other provisions which are not pertinent here. The contract is signed, "Louis A. Albert; Ernest Scott & Co. H. Austin." The contract is on two pages of a letterhead of "Ernest Scott & Co." A third page, on the same letterhead, is attached and contains the following: "Estimate No. Agreement Accompanying letter of Agreement 1929 to Mr. Louis A. Albert * * * Chicago, Ill. or his Nominee. Description 'Scott Solvent Vacuum Distilling Plant having a capacity for handling 1000 gallons per hour of dry cleaners' dirty solvent." Then follow the price and the terms of payment; near the bottom it is signed, "Ernest Scott & Company, H. Austin." Printed near the bottom is the following: "Particular attention is drawn to the conditions of contract printed on back hereof." On the back of this third page are a number of printed paragraphs. The fourth paragraph is, "OWNERSHIP OF GOODS SUPPLIED. All plant and materials, although delivered, are to remain our property until the complete plant is paid for in full, unless otherwise specially arranged for in writing." It is this paragraph that counsel for defendant contend makes the sale of the plant a conditional sale and not an absolute one.

On the other side, counsel for complainant say that the

the written contract for the purchase and [illegible] of the distilling plant. The contract [illegible] and July 17, 19[illegible], between Louis A. Albert "or his nominee" [illegible] as the "Owner-Observer" and "Ernest Scott & Co." [illegible] as the "Contractor", and the material parts are as follows: "The Owner agrees [illegible] to Purchase and the Contractor undertakes [illegible] to [illegible] the Owner-Observer, one 1000 (one thousand) gallon per hour 'Low [illegible] Vacuum Distilling Plant' [illegible] dated July 19, 19[illegible], to Mr. L. A. Albert [illegible] are to pay the Contractor the [illegible] and erected on Purchaser's premises in [illegible] Chicago, Ill." Then follows [illegible] ment here. The contract is signed, "Louis A. Albert; Ernest Scott & Co. E. Austin." The contract is [illegible] "Ernest Scott & Co." A third copy, on the same [illegible] attached and contains the [illegible] "Distilling [illegible] Accompanying letter of <u>Ernest Scott & Co.</u> [illegible] <u>Chicago, Ill.</u> or his nominee. Description [illegible] Distilling Plant having a capacity for [illegible] hour of dry cleaners' dirty solvent." Then follows [illegible] the terms of payment; here the letter [illegible] & Company, E. Austin." [illegible] "Particular attention is drawn to the [illegible] painted on back hatch." [illegible] number of painted surfaces. The [illegible] OF GOODS [illegible] are to remain our property until [illegible] full, unless otherwise specially [illegible] this paragraph [illegible] of the plant a certificate [illegible]

On the 26 of July, Ernest [illegible]

third page of the agreement, on the back of which appears paragraph 4 above quoted, is not a part of the contract; that the contract consists of but the first two pages, and is signed by the parties. It is an elemental rule that in construing a contract, the meaning of the contract is to be found in the terms of the entire contract whether written on one or several pieces of paper, and the place where the signatures appear is not always of controlling importance.

By the contract before us the purchasers agreed to purchase, and the contractors agreed to sell and install, a vacuum distilling plant in the premises in Chicago. And it provides that it is "further described in the attached letter, dated July 19, 1929." The attached letter is page three, above mentioned, and the only reference in the contract to this letter is that a further description of the property will be found in the letter. The description is the only part of the letter that can be construed to be a part of the contract. There is no reference in the contract to the effect that the conditions of the sale may be found in the letter, page three, or on the back thereof. In these circumstances, the conditions printed on the back of the letter were not incorporated in and made a part of the contract.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

third page of the agreement, on the back of which [illegible] above quoted, is not a part of the contract; [illegible] consists of but the first two pages, [illegible] [illegible]. It is an elementary rule that in construing a [illegible] of the contract is to be found in the terms of the [illegible] whether written on one or several pieces of paper, [illegible] where the signatures appear in [illegible].

By the contract [illegible] above, and the contractors agree [illegible] distilling plant in the premises [illegible] it is "further understood in the [illegible] 1898." The attached letter is [illegible] only reference in the contract to [illegible] description of the property will be found [illegible] description is the only part of the letter that [illegible] to be a part of the contract. There is no [illegible] that to the effect that the application [illegible] in the letter, page three, or on the [illegible] circumstances, the conditions mentioned on the back of the letter were not incorporated in and made a part of the contract.

The order of the superior court of [illegible] from is affirmed.

[illegible]

McCurdy, P. J., and Haverstock, J., concur.

38736

PEOPLE OF THE STATE OF ILLINOIS, ex rel. OSCAR NELSON, as Auditor of Public Accounts of the State of Illinois,

vs.

IMMEL STATE BANK.

FRENZEL BROTHERS COMPANY, Appellee,

vs.

WILLIAM L. O'CONNELL, as Receiver of the IMMEL STATE BANK, Appellant.

74

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

285 I.A. 583

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Auditor of Public Accounts brought suit to liquidate the Immel State Bank and a receiver was appointed. Frenzel Brothers Co. had deposited money in the bank before it was closed; its claim for $4250 was allowed as a preferred claim and the receiver appeals.

The record discloses that prior to April 30, 1931, Frenzel Bros. Co., which will hereafter be referred to as the claimant, had several checking accounts with the Immel State Bank, one of which was in excess of $5,000, and on April 30, 1931, Joseph Frenzel of claimant company went to the bank to get $5,000 for the purpose of depositing the money with the Commissioner of Public Works of Chicago, on a bid. The draft teller of the bank suggested that Frenzel take a cashier's check for the amount. Claimant then drew its check and obtained a cashier's check for $5,000, payable to the Commissioner of Public Works, and the amount was charged against claimant's account. Apparently the cashier's check was deposited with the Commissioner of Public Works of the City, but the City held up the bids and the check, and while it was being so held the bank, on July 2nd, was closed by the Auditor of Public Accounts. The check had not, in the meantime, been paid because

38736

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. OSCAR HANSON, as Auditor
of Public Accounts of the State
of Illinois,

vs.

IRMEL STATE BANK.

FRENSEL BROTHERS COMPANY,
Appellee,

vs.

WILLIAM L. O'CONNELL, as Receiver of
the IRMEL STATE BANK,
Appellant.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Auditor of Public Accounts brought suit to liquidate the Irmel State Bank and a receiver was appointed. Frensel Brothers Co. had deposited money in the bank before it [illegible]; its claim for $4250 was allowed as a preferred claim [illegible] receiver appeals.

The record discloses that prior to April 30, 1931, Frensel Bros. Co., which will hereafter be referred to as [illegible] claimant, had several checking accounts with the Irmel State [illegible], one of which was in excess of $5,000, and on April [illegible], 1931, Joseph Frensel of claimant company went to the bank to get $5,000 for the purpose of depositing the money with the Commissioner of Public Works of Chicago, on a bid. The cashier told him [illegible] the bank [illegible] that Frensel take a cashier's check for the amount. Claimant then drew its check and obtained a cashier's [illegible], payable to the Commissioner of Public Works, and the amount was charged against claimant's account. Apparently [illegible] was deposited with the Commissioner of [illegible] the city, but the city held up the bids and the [illegible], [illegible] so held the bank, on July 2nd, was closed by the Auditor of Public Accounts. The check had not, in the [illegible], been paid because

it had not been presented to the bank. November 27, 1931, the claimant company filed a general claim for the amount of the check which was allowed, and afterward a 15% dividend was paid. July 24, 1935, claimant filed its petition praying that its claim be allowed as a preferred claim. The receiver filed an answer contesting claimant's right, and after hearing an order was entered allowing the claim as a preferred claim, and the receiver appeals.

In his brief counsel for claimant says, "Claimant claims it is entitled to a preference under the Act of July 8, 1931; that the Act is remedial and that filing with the Receiver was a sufficient compliance with the 'presented for payment' provision." And in support of this contention counsel cites par. 37, sec. 13, chap. 16a, Illinois State Bar Stats. 1935; McQueen v. Randall, 353 Ill. 231; People ex rel. Nelson v. Dennhardt, 354 Ill. 450. In each of the two cases just cited certain contentions were made that the Act (or certain parts of it) was unconstitutional, but the contentions were overruled and the Act upheld. The order appealed from in the instant case was entered August 1, 1935, and the court apparently followed the ruling announced by the Supreme court in the two cases cited. But afterward the Supreme court, on December 19, 1935, held that the Act, in its entirety, was unconstitutional. People v. Union Bank & Trust Co., 362 Ill. 164. In that case constitutional questions were raised which were not involved in the McQueen and Dennhardt cases.

Since claimant bases its right to a preferred claim on the provisions of the Act which has been declared unconstitutional, the order appealed from must be reversed.

Claimant is entitled to have its claim allowed only as a general creditor. People ex rel. Nelson v. Builders & Merchants Bank, 264 Ill. App. 388; People ex rel. Nelson v. Lincoln Trust & Savings Bank, 279 Ill. App. 18.

The order of the Superior court of Cook county is reversed.

ORDER REVERSED.

McSurely, P. J., and Matchett, J., concur.

it had not been presented to the [illegible]. However [illegible], the claimant company filed a general claim [illegible] which was allowed, and afterward a [illegible]. [illegible] 24, 1935, claimant filed its petition [illegible] lowed as a preferred claim. [illegible] ing claimant's right, and [illegible] ing the claim as a preferred claim, [illegible].

In his brief counsel for claimant says, "[illegible] it is entitled to a preference under the Act of [illegible]; that the Act is remedial and that [illegible], with [illegible] client compliance with the 'preferred [illegible]'." And in support of this contention counsel cite [illegible] Ill. App. 23; People ex rel. Salzen v. Dempsey, 334 Ill. [illegible]. In each of the two cases just cited certain contentions were [illegible] Act (or certain parts of it) was a confiscation. [illegible] tions were overruled and the Act upheld. [illegible] in the instant case was entered August [illegible], [illegible] peremptly followed the ruling announced by [illegible] in the two cases cited. But afterward this supreme court, on December 19, 1935, held that the Act, in its entirety, was unconstitutional. People v. Union Bank & Trust Co., 362 Ill. 167. [illegible] additional questions were raised which were not [illegible] the Modgeon and Dempsey cases.

Since claimant bases its [illegible] to a preferred [illegible] provisions of the Act which [illegible] order succeeded from must be reversed.

Claimant is entitled to have its claim [illegible] as a general creditor. People ex rel. Dolson v. Illinois Industrial Bank, 264 Ill. App. 388; People ex rel. Dawson v. [illegible] Savings Bank, 279 Ill. App. 12.

The order of the superior court [illegible] reversed.

[illegible].

McSurely, P. J., and Matchett, J., concur.

38106

ROBERT BRUNER, BERNARD HARRISON, JOHN M. REEDER, CHARLES M. BRAUN, ANDREW LINNEAR, MIKE PARENTI and ALBERT DYKAS, individually and as representatives of the members of POULTRY DRESSERS UNION OF CHICAGO, LOCAL number 158,

Appellants,

v.

THOMAS J. COURTNEY, State's Attorney of Cook County, JAMES P. ALLMAN, Commissioner of Police of the City of Chicago, DANIEL GILBERT, Captain of Police of the City of Chicago, PATRICK J. COLLINS, Captain of Police of the City of Chicago,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

285 I.A. 584

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On January 14th, 1935, complainants filed their bill in the Superior Court of Cook County, in which it is charged, among other things, that they are members of a certain labor union, and that such union is an association of skilled workers, engaged in the killing and dressing of certain animals for market; that in the month of October, 1934, and at intervals up to December, 12th, 1934, the members of this union had a controversy with their employers concerning wages, and that the members of such union, not having come to an agreement with such employers regarding the rate of wages to be paid, on December 12th, 1934, voted to strike, and that thereafter the members of the union did not report to work at the place of business of their respective employers, and that from such last mentioned date up to the time of the filing of the bill, the strike had remained in progress; that the strike had been conducted in a lawful and legal manner; that no threats or intimidations had been made, and no force, violence or coercion used in the progress of the strike; that peaceably, and without intimidation, violence, force or threats, they attempted to inform the public through various

38106

ROBERT BRUNET, BERNARD [illegible], JOHN M. BENDER, CHARLES M. [illegible], AND [illegible] LINNEAR, MIKE [illegible] and ROBERT [illegible], individually and as representatives of the members of POULTRY [illegible] OF CHICAGO, LOCAL number 186,

Appellants,

v.

THOMAS J. DOUGHERTY, State's Attorney of Cook County, JAMES M. ALLEN, Commissioner of Police of the City of Chicago, [illegible] GILBERT, Captain of Police of the City of Chicago, PATRICK J. COLLINS, Master of Police of the City of Chicago,

Appellees.

COOK COUNTY.

395 I.A. 384

MR. PRESIDING JUSTICE [illegible] DELIVERED THE [illegible] OPINION OF THE COURT.

On January 14th, 1936, appellants [illegible] their bill in the Superior Court of Cook County, in which it is averred, among other things, that they are members of a certain [illegible] union, and that such union is an association of skilled workers, engaged in the killing and dressing of certain animals for [illegible]; that in the month of October, 1934, and at intervals [illegible] to December, 1935, the members of this union had a controversy with their employers concerning wages, and that the [illegible] of [illegible], not having come to an agreement with such employers [illegible] to be paid, on December 14th, 1935, voted to strike, [illegible] that thereafter the members of the union did [illegible] of business of their respective employers, [illegible] mentioned date up to the time of the filing of the bill, the strike had remained in progress; that the strike has been conducted in a lawful and legal manner; that no threats or intimidations had been made, and no force, violence or coercion used in the progress of the strike; that peacefully, and without intimidation, violence, force or threats, they attempted to inform the public through [illegible]

devices that they were on a strike, and among other things, had various of the members of such union parade certain sidewalks with a banner bearing the motto, "This place is unfair to organized labor, Poultry Dressers Union 158 of A. M. C. & B. W. of N. A., A. F. of L." and that only one person bearing such banner appeared in front of any of the places of business of the employers of any of the members of the union at any time. It is further alleged in the bill that these persons had a perfect legal right to do the acts aforementioned, but that notwithstanding such rights, Thomas J. Courtney, State's Attorney of Cook County, without any warrant of law, maliciously and capriciously ordered the police of the City of Chicago to arrest each member of the local to which these people belonged, so appearing on the public streets and highways of the City of Chicago; that in pursuance of the orders of the State's Attorney, Patrick J. Collins, Captain of Police of the City of Chicago, directed the police officers acting under him to arrest the members of the so-called Local 158, and that in pursuance of such order of the Chief of Police, various members of the union on the 29th day of December, 1934, were arrested and taken to the Des Plaines Street Station, and that after a hearing, they were discharged. It is further alleged that at the hearings of such cases, no one appeared against such persons, and that no proof or evidence of any kind was offered by the state. It is further charged in the bill that at the hearing of such cases, Captain Patrick J. Collins, in command of the Des Plaines Street District, stated that he had been ordered by the State's Attorney "to arrest all pickets, and to continue arresting them as often as they appeared on the streets," and that these orders came from Daniel Gilbert, a police captain assigned to the office of Thomas J. Courtney, State's Attorney, and chief investigator for the said Thomas J. Courtney, State's Attorney. The hearing was had on the bill and affidavits attached. The prayer

devices that they were on a strike, [illegible] various of the members of such union [illegible] a banner bearing the motto, "This place [illegible] Labor, Poultry Dressers Union 482 of [illegible] A. F. of L." and that only one person [illegible] in front of any of the areas of business [illegible] of the members of the union at any time. It [illegible] in the bill that these persons [illegible] acts aforementioned, but that [illegible] J. Courtney, State's Attorney [illegible] of law, maliciously and capriciously [illegible] of Chicago to arrest each member of the [illegible] belonged, so appearing on the public streets [illegible] City of Chicago; that in pursuance of the [illegible] Attorney, Patrick J. Quinlan, Captain of Police [illegible] Chicago, directed the police officers [illegible] members of the so-called Local 482, [illegible] order of the Chief of Police, [illegible] 28th day of December, 1934, [illegible] Street Station, and that after a hearing, [illegible] It is further alleged that at the hearings [illegible] ed against such persons, and that no [illegible] was offered by the state. It is further [illegible] at the hearing of such cases, [illegible] of the Des Plaines Street District, [illegible] by the State's Attorney "to arrest all [illegible] arresting them as often as they appeared [illegible] these orders came from Daniel Gilbert, [illegible] to the office of Thomas J. Courtney, [illegible] investigator for the said Thomas J. Courtney, State's Attorney. The hearing was had on the bill and affidavits attached. The [illegible]

of the bill is that "a temporary injunction issue, without bond, which upon a final hearing may be made permanent, restraining said defendants, and each of them, their deputies, subordinate police officers and patrolmen, and their agents and attorneys, from molesting, arresting, interfering with and preventing the plaintiffs, and each of them, from peaceably and without threats or intimidation being upon any public street or thoroughfare in the City of Chicago, adjacent to or in front of any place of business of any person with whom they are engaged in a labor dispute, and from carrying a banner bearing the legend: "This place is unfair to organized labor Poultry Dressers Union 158 of A.M.C. & B. W. of N. A., A.F. of L."

Various affidavits are appended to the bill, and they contain substantially the same averments as are made in the bill itself.

On January 16th, 1935, upon notice to the defendants, the court entered an order to the effect that "Thomas J. Courtney, State's Attorney of Cook County, James P. Allman, Commissioner of Police of the City of Chicago, Daniel Gilbert, Captain of Police of the City of Chicago, Patrick J. Collins, Captain of Police of the City of Chicago, and each of them, their deputies, subordinate police officers and patrolmen, their attorneys and agents do absolutely desist and refrain from molesting, arresting and interfering with and preventing the plaintiffs in this suit, and each of them, from peaceably, and without threats or intimidation, being upon any public street or thoroughfare or highway in the City of Chicago, adjacent to, or in front of any place of business of any person with whom they are engaged in a labor dispute, and from carrying a banner bearing the legend: 'This place is unfair to organized labor. Poultry Dressers Union 158 of A.M. C. & B.W. of N. A., A.F.L.', provided, however, that only one such person or picket shall display such banner at the same time before such place of business, and provided, further, that said person or picket is violating no law

of the bill is that "a temporary injunction issue, without bond, which upon a final hearing may be made permanent, restraining said defendants, and each of them, their deputies, subordinate police officers and patrolmen, and their agents and attorneys, from molesting, arresting, interfering with and threatening the liability, and each of them, from peacably and without threats or intimidation being upon any public street or thoroughfare in the City of Chicago, adjacent to or in front of any place of business of any person with whom they are engaged in a labor dispute, and from carrying a banner bearing the legend: "This place is unfair to organized labor Poultry Dressers Union 158 of A.F.L. & C. & B.W. of A. A. F. of L."

Various affidavits are appended to the bill, and they contain substantially the same averments as are in the bill itself.

On January 15th, 1938, upon notice to the defendants, the court entered an order to the effect that "Thomas A. Courtney, State's Attorney of Cook County, James B. Allison, Commissioner of Police of the City of Chicago, Daniel Ahlberg, Captain of Police of the City of Chicago, Patrick J. Collins, Capt. in Police of the City of Chicago, and each of them, their deputies, subordinate police officers and patrolmen, their attorney and agents be absolutely desist and refrain from molesting, arresting and interfering with and preventing the plaintiffs in this suit, and each of them, from peacably, and without threats or intimidation, being upon any public street or thoroughfare or highway in the City of Chicago, adjacent to, or in front of any place of business of any person with whom they are engaged in a labor dispute, and from carrying a banner bearing the legend: 'This place is unfair to organized labor. Poultry Dressers Union 158 of A.F.L. C. & B.W. of A. A. F. of L.'", provided, however, that only one such person or picket shall display such banner at the same time before such place of business, and provided, further, that said person or picket is violating no law

of the State of Illinois, or any ordinance of the City of Chicago, until the further order of the court." This order was issued without bond.

Although the record does not show that an answer was filed by the defendants, nor that the cause was referred to a master in chancery, the court on January 18th, 1935, entered an order to the effect that a reference theretofore made, be vacated, that leave be given to the defendants to withdraw their answer, and that a motion to vacate the order for temporary injunction theretofore entered, be set down for a hearing on January 19th, 1935. On January 19th, 1935, after a hearing was had apparently on the bill and affidavits alone, the court entered an order to the effect that the temporary injunction theretofore granted, be set aside and vacated, and the bill dismissed for want of equity. It is from this last order that the appeal herein is taken.

There is no showing that Captain Patrick J. Collins, or anyone in authority, had indicated by act or deed that he or they intended to act upon the alleged orders of the State's Attorney, and it is shown that all the persons arrested had been discharged after a hearing by the court, and before the bill was filed. If these people were illegally arrested, it is possible that they might have an action at law against the persons causing such illegal arrest, but there is nothing in the bill which indicates their right to an order for an injunction against these defendants for acts already committed. There is not the slightest suggestion that any of the defendants had indicated by any act or word that further arrests were intended, other than the language charged to have been used by Captain Patrick J. Collins in the courtroom, where he is alleged to have stated that he had been directed by the State's Attorney to arrest all pickets, and to continue arresting them as often as they appeared on the streets. It is further to be noted that there

of the State of Illinois, or any ordinance of the City of Chicago, until the further order of the court." This order was issued without bond.

Although the record does not show that an answer was filed by the defendants, nor that the cause was referred to a master in chancery, the court on January 19th, 1933, entered an order to the effect that a reference theretofore made, be vacated, that leave be given to the defendants to withdraw their answer, and that a motion to vacate the order for temporary injunction theretofore entered, be set down for a hearing on January 24th, 1933. On January 19th, 1933, after a hearing was apparently on the bill and affidavits alone, the court entered an order to the effect that the temporary injunction theretofore granted, be set aside and vacated, and the bill dismissed for want of equity. It is from this last order that the appeal herein is taken.

There is no showing that Captain Patrick J. Collins, or anyone in authority, had indicated by act or word that he or they intended to act upon the alleged orders of the State's attorney, and it is shown that all the persons arrested had been released after a hearing by the court, and before the bill was filed. If these people were illegally arrested, it is possible that they might have an action at law against the persons causing such illegal arrest, but there is nothing in the bill which indicates their right to an order for an injunction against these defendants for the offense committed. There is not the slightest suggestion that any of the defendants had indicated by any act or word that further arrests were intended, other than the language claimed to have been used by Captain Patrick J. Collins in the courtroom, where he is alleged to have stated that he had been directed by the State's Attorney to arrest all pickets, and to continue arresting them as often as they appeared on the streets. It is further to be noted that there

is no showing made that after their discharge the defendants had any reason to fear that because of any act or threat of any defendant, further arrests would be made.

In Lowenthal v. New Music Hall Co., 100 Ill. App. 274, this court said:

> "It is said by our Supreme Court, in Menard v. Hood, 68 Ill. 121: 'In our practice the writ of injunction is only called into use to afford preventive relief. It is never employed to give affirmative relief, or to correct wrongs and injuries already perpetrated, or to restore parties to rights of which they have been deprived.'
>
> And this doctrine was approved in Baxter v. Board of Trade, 83 Ill. 146, [where it was charged that a person had been illegally deprived of his membership in the Chicago Board of Trade,] where it is said: 'If a party has been excluded from the rights and privileges of a corporation by the action of the corporation, he ought not to be restored until it has been determined that the act of expulsion by the corporation was illegal; and yet, if the remedy was by injunction, as is claimed here, the effect would be to restore the party in the first instance, even though he may have been legally expelled, and leave the determination of the legality of the act to be determined in the future. We do not understand resort can be had to the writ of injunction, either directly or indirectly, to obtain affirmative relief.'
>
> In Wangelin v. Goe, 50 Ill. 463, it was held: An injunction is a preventive remedy. It comes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it can not be applied correctively so as to remove it. That was held in a case where the owner of a mill, claiming to have been forcibly and illegally put out of possession, filed a bill for an injunction to restrain the defendants from interfering with his resuming possession, as is here done. 'The deed was done, and there remained nothing on which the writ of injunction could operate.' The case of Fisher v. Board of Trade, 80 Ill. 85, is to the same effect, and what is there said in relation to the relief claimed because of irreparable injury resulting from loss of profits is applicable here. Other cases to the same effect: Lake Shore & M. S. Ry. Co. v. Taylor, 134 Ill. 603; Commissioners of Highways v. Deboe, 43 Ill. App. 25; World's Columbian Exposition v. Brennan, 51 Ill. App. 128; Mead v. Cleland, 62 Ill. App. 294; Goff v. Eckert, 65 Ill. App. 616."

See also Menard v. Hood, 68 Ill. 121.

The decree of the Superior Court is affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

is no [illegible] case [illegible] by reason to [illegible] further [illegible].

In [illegible] v. [illegible], [illegible] court said:

> "It is [illegible] 88 III. 149: 'In [illegible] only [illegible] never [illegible] wrongs and injuries [illegible] rights of which they have [illegible] deprived.'
>
> [illegible] Trade, 88 III. [illegible] had been illegally [illegible] board of trade.] where it is said: 'It [illegible] been excluded from the rights and privileges of [illegible] by the action of the corporation, [illegible] ed until it has been [illegible] the corporation was illegal; [illegible] injunction, as a [illegible] store the party in the first [illegible] been legally expelled, and [illegible] legality of the act to be determined [illegible] not understand [illegible] either directly or indirectly [illegible]
>
> In [illegible] v. [illegible], 60 Ill. [illegible] tion is a preventive remedy. It [illegible] and the injury [illegible] be directly done, the mult [illegible] be applied correctively [illegible] a case where the owner [illegible] forcibly and illegally [illegible] an injunction to oust him [illegible] nia reading, generally [illegible] and there remained not [illegible] would operate. The case of [illegible] 85, is to the [illegible] to the [illegible] from lack of [illegible] same effect: [illegible] Commissioners of [illegible] v. [illegible]; [illegible] Columbian [illegible] v. [illegible] Island, [illegible]; [illegible]

See also [illegible] v. [illegible], 60 Ill. [illegible].

The decree of the [illegible]

[illegible], J. [illegible]

38130

JESSE W. RITTER, Appellee, v. CITY OF CHICAGO, a Municipal Corporation, Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

285 I.A. 584

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County against defendant for the sum of $6,000.00, entered in a suit brought by plaintiff against the defendant upon a charge that plaintiff was injured through defendant's negligence. Trial was had before a jury, which returned a verdict for the amount of the judgment.

The charge in the declaration filed in the cause is substantially, that defendant, a municipal corporation, was, on the 10th day of June, 1929, possessed of and had supervision over a certain public street, known as Clark Street, at or near its intersection with a certain other public street, known as Lincoln Street, in the City of Chicago, county of Cook, and state of Illinois, and that the defendant was bound to use reasonable care to keep and maintain the street in a reasonably safe condition for travel; that, disregarding its duty in that behalf, defendant negligently suffered the street at the place mentioned to be, and continue to be, in an unsafe and dangerous condition for travel, because of certain holes and depressions in the street, and that the same had existed for a sufficient length of time for the defendant to know, or by the exercise of ordinary care, to ascertain such condition. It is alleged that plaintiff, while riding in a taxicab upon Clark Street, at or near its intersection of Lincoln Street, was unavoidably thrown about in the cab, by reason of the cab's coming in contact with the holes in the

38130

JESSE W. PITTS, Appellee,	[illegible] Term.
v.	[illegible]
CITY OF CHICAGO, a municipal Corporation, Appellant.	[illegible] County.

SEP 17 1934

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County against defendant for the sum of [illegible], [illegible] in a suit brought by plaintiff against the defendant upon a claim that plaintiff was injured through defendant's negligence. Trial was had before a jury, which returned a verdict for the amount of the judgment.

The charge in the declaration filed in the cause is substantially, that defendant, a municipal corporation, was, on the 14th day of June, 1929, possessed of and had supervision over a certain public street, known as Clark street, at or near its intersection with a certain other public street, known as Lincoln street, in the City of Chicago, county of Cook, and state of Illinois, and that the defendant was bound to use reasonable care to keep and maintain the street in a reasonably safe condition for travel; that, disregarding its duty in that behalf, defendant negligently maintained the street at the place mentioned to be, and continued [illegible], in an unsafe and dangerous condition for travel, because of certain holes and depressions in the street, and that the same had existed for a sufficient length of time for the defendant to know, or by the exercise of ordinary care, to ascertain such condition. It is alleged that plaintiff, while riding in a taxicab upon Clark street, [illegible] the intersection of Lincoln Street, [illegible] unavoidably thrown out in the cab, by reason of the cab's coming in contact with the [illegible] in the

street, and that as a result, plaintiff was seriously injured. It is alleged that prior to the filing of the praecipe in the cause, and on November 7th, 1929, the plaintiff caused the following notice to be served upon the defendant:

"To: The City of Chicago, a municipal corporation,
William D. Saltiel, City Attorney, and
Patrick Sheridan Smith, City Clerk.

Gentlemen:

You and each of you are hereby notified that our client, Dr. Jesse W. Ritter, was injured on the 10th day of June, 1929, at the hour of about 8:30 o'clock A. M., when, while riding in a taxicab of the Yellow Cab Company, a corporation, upon and along North Clark Street, in the City of Chicago, at or near the intersection of Lincoln Street with said Clark Street, said taxicab was caused to and did, run into a certain hole in the street, thereby seriously injuring the said Dr. Jesse W. Ritter.

Dr. Ritter was taken home and treated by Dr. C. W. K. Briggs, whose address is 1524 Thorndale Avenue, and thereafter as the injuries by him received became more severe, Dr. Ritter was treated by Dr. Howard R. Chislett, whose address is 4721 Greenwood Avenue.

At the time of the injuries in question Dr. Ritter resided at 2329½ Commonwealth Avenue, in the City of Chicago, where he still resides.

(Signed by Clark and Clark, attorneys for Dr. Jesse W. Ritter. Notice served November 7, 1929.)"

Plaintiff testified in substance that he is a dentist, and that his office is located at 16 North Wabash Avenue; that he lives at 2329½ Commonwealth Avenue; that on June 10th, 1929, at about 8:30 o'clock in the morning, he took a Yellow cab, instructing the driver to take him to 16 North Wabash Avenue; that the driver went to Belden Avenue, and then east to Lincoln Park West, and that he was taken directly into Clark Street; that suddenly he had a terrible jolt; that his head struck the dome light in the top of the cab, and that after this, he was groggy and suffered a good deal of pain in his head, neck, shoulders and back; that there was a numbness in his feet and toes; that there was pain in the lower part of his stomach, and that he was bruised in the lower abdominal region; that

street, and that he a result, plaintiff was [illegible] injured. It is alleged that prior to the filing of the [illegible] and on November 7th, 1929, the plaintiff caused to be served the following notice to be served upon the defendant:

"To: The City of Chicago, a municipal corporation,
William D. Santiel, City Attorney, and
Patrick Sheridan Smith, City Clerk.

Gentlemen:

You and each of you are hereby notified that our client, Dr. James [illegible] Ritter, was injured on the 27th day of June, 1929, at the hour of about 7:30 o'clock [illegible], when, while riding in a taxicab of the Yellow Cab Co., [illegible] upon and along North Clark Street, in the City of Chicago, at or near the intersection of Lincoln Street and North Clark Street, said taxicab was caused to and did, run into a certain hole in the street, thereby wrongfully injuring the said Dr. James W. Ritter.

Dr. Ritter was taken home and treated by Dr. [illegible] Briggs, whose address is 1324 Thorndale Avenue, and thereafter as the injuries by him received become more serious, Dr. Ritter was treated by Dr. Howard [illegible], whose address is 4721 Greenwood Avenue.

At the time of the injuries in question Dr. Ritter resided at 2329½ Commonwealth Avenue, in the City of Chicago, where he still resides.

(Signed by Olsen and Olsen, attorneys for Dr. James [illegible] Ritter. Notice served November 7, 1929.)"

Plaintiff testified in substance that [illegible] resident, and that his office is located at [illegible] North [illegible] street in the [illegible] at 2329½ Commonwealth Avenue; that on June [illegible], 1929, at about 8:30 o'clock in the morning, he took a Yellow cab, instructing the driver to take him to [illegible] North Avenue; [illegible] the driver went to Belden Avenue, and then east to [illegible], and then he was taken directly into Clark Street; [illegible] jolt; that his head struck the dome light in the top of the cab, and that after this, he was groggy and suffered [illegible] in his head, neck, shoulders and back; that [illegible] a numbness in his feet and toes; that there was pain in the lower part of his stomach, and that he was bruised in the lower abdominal region; that

he was afterwards operated for hernia; that since the accident, he has an impairment of hearing in his left ear; that he misses things in talking over the telephone; that the condition of his ear prior to the accident was perfect; that his prior earnings were something in the neighborhood of $1,100.00 per month. On cross-examination, plaintiff testified that in 1908 he had an operation for appendectomy. It was stipulated that plaintiff was paid $1,000.00 by the Yellow Cab Company, and that he entered into an agreement with that company not to sue.

The defendant offered no testimony as to the condition of the street, nor as to the accident in question. It is claimed by defendant, however, that certain physical conditions of plaintiff, claimed to have resulted from the accident, had existed prior thereto, and that there is no causal connection between such condition and the accident. It is also claimed that plaintiff failed to serve notice upon the defendant of the time and place of the accident, as required by law.

Upon the question as to the extent of plaintiff's injuries, Dr. Clement W. Briggs, a witness for plaintiff, testified in substance that he was a physician and surgeon; that he examined the plaintiff on June 10th, 1929, and made a complete physical examination; that he found a contusion on the head with the beginning formation of a hematoma, which means a blood tumor, the accumulation of blood over the scalp; that he found evidence of marked rigidity, inability to move the head and cervical vertebra; that there was evidence of tension, pain, involvement of the intercostal nerve on the right side of the chest, discoloration, and swelling in the lower abdominal zone; that he found an inguinal hernia, which means rupture; that he ordered ice bags to the head and heat to the lower abdominal zone; that he treated the plaintiff for about two months; that he

he was afterwards operated for cancer; [illegible] since [illegible] cent, he has an impairment of hearing in his left ear; [illegible] things in talking over the telephone; that the condition of his [illegible] prior to the accident was perfect; that this motor [illegible] was something in the neighborhood of $1,100.00 per month. [illegible] rehabilitation, plaintiff testified that in 1906 he had an operation for appendectomy. It was stipulated that plaintiff's [illegible] by the Yellow Cab Company, and that he entered into an agreement with that company not to sue.

The defendant offered no testimony as to the condition of the street, nor as to the accident in question. It is claimed by defendant, however, that certain physical conditions of plaintiff, claimed to have resulted from the accident, [illegible] prior thereto and that there is no causal connection between such condition and the accident. It is also claimed that plaintiff failed to serve notice upon the defendant of the time and place of the accident, as required by law.

Upon the question as to the extent of plaintiff's injuries, Dr. Clement V. Briggs, a witness for plaintiff, testified in substance that he was a physician and surgeon; that he examined the plaintiff on June 10th, 1922, and made a complete physical examination; that he found a contusion on the head with [illegible] formation of a hematoma, which means a blood tumor, the accumulation of blood over the scalp; that he found evidence of impaired vitality, inability to move the head and cervical vertebra; that there was evidence of tension, pain, involvement of the intercostal nerve on the right side of the chest, discoloration, and resulting in [illegible] lower abdominal zone; that he found an inguinal hernia, which means rupture; that he ordered ice bags to the head and rest to the lower abdominal zone; that he treated the plaintiff for about two months; that he

advised him to wear a truss, or be operated on for hernia; that one Dr. Chislett operated on the plaintiff; that the witness was familiar with the fair and reasonable charge for Dr. Chisslett's services, which would be from $150.00 to $200.00. This witness further testified to the effect that on examining plaintiff about a month prior to the trial, he found that the hernia was perfectly clear and healed, and that the scar tissues had perfectly covered the aperture, and that so far as his examination, revealed that plaintiff had no hernia prior to the accident. This latter statement was brought out by a question propounded by defendant's counsel.

Fred M. Miller, a physician produced by defendant, testified that he had specialized in traumatic surgery since 1922, and that about August 14th, 1929, he examined the plaintiff at the Chicago Memorial Hospital at 33rd and Lake Park Avenue; that at that time a Dr. Chislett was operating on the plaintiff for inguinal hernia, left side, and that at that time, there was a protrusion about the size of a large egg. Doctor Miller testified that in his opinion, the hernia was of long standing, probably a year's duration, because of the length of the sac, the peritoneum, on account of the thickness of the sac, and the adhesions about the sac. Dr. Miller further testified that "hernias are never brought about suddenly in the inguinal region".

Dr. Frank Schrem, another physician produced by defendant, testified that he examined the plaintiff the latter part of June, 1929, and that he found no evidence of external injury; that at that time the plaintiff told the witness that he had been riding in a Yellow cab on Clark street; that the plaintiff told the witness at the time of the examination that the hernia condition was of 15 years standing; that he found a reducible inguinal hernia about the size of a good sized hen's egg, and that it was easily reducible; that in the opinion of the witness, the hernia predated the time of

advised him to wear a truss, or be operated on for hernia; that one Dr. Chislett operated on the plaintiff; that the charges were familiar with the fair and reasonable charge for Dr. Chislett's services, which would be from $100.00 to $250.00. This witness further testified to the effect that on examining plaintiff about a month prior to the trial, he found that the hernia was partially clear and healed, and that the scar tissue had partially covered the aperture, and that so far as his examination revealed that plaintiff had no hernia prior to the accident. This latter statement was brought out by a question propounded by defendant's counsel.

Fred K. Miller, a physician produced by defendant, testified that he had specialized in hernia surgery since 1890, and that about August 14th, 1922, he examined the plaintiff at the Chicago Memorial Hospital at 32nd and Lake Park Avenue; that at that time a Dr. Chislett was operating on the plaintiff for inguinal hernia, left side, and that at that time there was a protrusion about the size of a large egg. Doctor Miller testified that in his opinion, the hernia was of long standing, probably a congenital because of the length of the sac, the peritoneum, on account of the thickness of the sac, and the adhesions about the sac. Dr. Miller further testified that "hernias are never brought about suddenly in the inguinal region".

Dr. Frank Dorsen, another physician produced by defendant, testified that he examined the plaintiff the latter part of June, 1922, and that he found no evidence of external injury; that at that time the plaintiff told the witness that he had been riding in a Yellow cab on Clark street; that the plaintiff told the witness at the time of the examination that the mental condition was of 15 years standing; that he found a reducible inguinal hernia; that the size of a good sized man's egg, and that it was easily reducible; that in the opinion of the witness, the hernia predated the time of

the alleged injury. He stated that he made the examination for the Employers Life Insurance Corporation.

A witness produced by plaintiff testified to the effect that he was familiar with the condition of the pavement in the neighborhood of 1820 North Clark Street, opposite the entrance to a hotel at that point; that there was an opening in the street at this point; that the surface had not been put on, and that there was no concrete on it, it was an open hole filled with loose gravel and rock; that the cut in the street which he described was from 2½ to 3 feet wide; that that was the condition in November. This witness testified that the hole described was from 60 to 70 feet from the intersection of Lincoln Avenue and Clark Street.

The driver of the cab in question testified that in June, 1929, he was employed by the Yellow Cab Company; that on June 10th, 1929, at about 8:15 in the morning, plaintiff became a passenger in his cab; that going south on Clark Street they came to the front of the Lincoln Hotel, which is at the intersection of Lincoln avenue, Wells and Clark street; that there were mud puddles there, and what appeared to be a mud puddle, proved to be a hole in the street; that the front end of the cab dropped down on the right side into this hole; that the chasis of the car went all the way down to the axle and bounced up again. This witness testified that he looked back and the doctor was on the floorboard; that the witness got up and went around to the back and helped Dr. Ritter up. He was half conscious, couldn't talk for a few minutes, was in a kind of a daze; that Dr. Ritter was not able to walk straight when the witness got him back to his home, he seemed limp, and he had to help him upstairs; that at the time of the accident, he was not traveling over 20 miles an hour, because traffic ahead of him; that the depression referred to was filled with half mud and water.

Plaintiff offered in evidence the original of the notice

the alleged injury. He stated that he was the executive for the Employers Life Insurance Corporation.

A witness produced by plaintiff testified that he was familiar with the condition of the street in front of the neighborhood of 1820 North Clark street, opposite the entrance to a hotel at that point; that there was an opening in the street at this point; that the surface had not been cut on, and that there was no concrete on it, it was an open hole filled with loose gravel and rock; that the cut in the street extended a distance from 4 to 3 feet wide; that that was the condition in November. This witness testified that the hole described was from 20 to 25 feet from the intersection of Lincoln Avenue and Clark Street.

The driver of the cab in question testified that in June, 1929, he was employed by the Yellow Cab Company; that on June 11th, 1929, at about 9:15 in the morning, plaintiff became a passenger in his cab; that going south on Clark street they came to the front of the Lincoln Hotel, which is at the intersection of Lincoln Avenue, Wells and Clark streets; that there was a hole there, and what appeared to be a mud puddle, proved to be [illegible] the street; that the front end of the cab dropped down on the right side into this hole; that the chassis of the car went all the way down to the axle and bounced up again. This witness testified that he looked back and the doctor was on the floorboard; that the witness got out and went around to the back and helped Dr. Ritter up. He was a bit confused, couldn't talk for a few minutes, was in a kind of a daze; that Dr. Ritter was not able to walk straight when the witness got him back to his home, he seemed lame. He had been to help his wife that at the time of the accident, he was not traveling 25 or 30 miles an hour, because traffic ahead of him; that the intersection referred to was filled with mud and water.

Plaintiff offered in evidence the original of the notice

set forth in the declaration, which it is alleged, was served upon the defendant, and that in addition to the portion pleaded, it contains the following:

> "Received a copy of the above notice this 7th day of November, 1929.
>
> William D. Saltiel, by H. B.
> City Attorney
> Patrick Sheridan Smith
> City Clerk"

As stated, defendant contends that the required statutory notice was not served on the city of Chicago. The receipt on the bottom of the original notice received in evidence indicates that the notice was served on the City Attorney and on the City Clerk. Further, in the trial and on the cross-examination of the plaintiff, the attorney for the defendant asked the plaintiff to describe the approximate size of the hole into which it was alleged the cab wheels dropped, causing the alleged injury, to which objection was made by counsel for plaintiff, and in reply to this objection, counsel for the city stated: "I have a right to go into that for this reason, this witness has served notice to the city." Neither in the trial, nor in the motion for a new trial, was there any question raised as to whether or not the defendant had been served with the required notice, and the question is raised for the first time on this appeal. The contention is entirely without merit.

It is next insisted that there is no proof that the accident happened in the city of Chicago and the state of Illinois. In the additional abstract filed by the plaintiff, it is shown that plaintiff testified that "Clark Street is the place where the accident happened. It is one of the public streets of the city of Chicago." This testimony of plaintiff is not mentioned in defendant's abstract. The court will take judicial notice of the fact that the City of Chicago is in the County of Cook, and state of Illinois.

Defendant's counsel insist that there is a variance be-

set forth in the declaration, which it is [illegible], was served upon the defendant, and that in addition to the notice [illegible], it contains the following:

"Received a copy of the above notice this 7th day of November, 1929.

William D. [illegible], by M. [illegible]
City Attorney
Patrick Sheridan Smith
City Clerk"

As stated, defendant contends that the required at-tutory notice was not served on the city of Chicago. The record on the bottom of the original notice received in evidence indicates that the notice was served on the City Attorney and on the City Clerk. Further, in the trial and on the cross-examination of the plaintiff, the attorney for the defendant asked the plaintiff to describe the approximate size of the hole into which it was alleged the [illegible] dropped, causing the alleged injury, to which objection was made by counsel for plaintiff, and in reply to this objection, counsel for the city stated: "I have a right to go into that for this reason, this witness has served notice to the city." Neither in the trial, nor in the motion for a new trial, was there any question raised as to whether or not the defendant had been served with the required notice, and the question is raised for the first time on file [illegible]. The contention is entirely without merit.

It is next insisted that there is no proof that the accident happened in the city of Chicago, [illegible] state of Illinois. In the additional abstract filed by the [illegible], it is stated that plaintiff testified that "Clark Street is the place where the accident happened. It is one of the public streets of the city of Chicago." This testimony of plaintiff is not controverted in defendant's abstract. The court will take judicial notice of the fact that the City of Chicago is in the County of Cook, and state of Illinois.

Defendant's counsel insist that there is a variance be-

tween the notice served on the city, and the proof as to the place of the accident. It will be noted that the notice served tells that the accident happened at the intersection of Lincoln Street and Clark Street, and the proof is that it happened at Lincoln Avenue and Clark Street, in the city of Chicago. During the trial, no question was raised as to the place of the accident. Counsel for defendant, throughout the trial, as shown by the record, proceeded upon the theory that the accident happened at or near the intersection of Lincoln Avenue and Clark Street, in the city of Chicago. No question was raised as to this matter either on the motion for a new trial, or on the motion in arrest of judgment. It is presented for the first time here.

In Graham v. City of Chicago, 346 Ill. 638, there was an objection made that the plaintiff should not have been allowed to recover because there was no proof that plaintiff was ever attended by the physician named in the notice. There was also no proof offered by the defendant in that case that this physician was not the attending physician, and no objection was raised on the trial on the question, and the court said:

> "There was no mention made of the objection now raised, either in the motion for a directed verdict, in the motion for a new trial, in the motion in arrest of judgment or in the assignments of error. It is too late for that objection to be made at this time. Pickett v. Kuchan, 323 Ill. 138; Highway Comrs. v. City of Bloomington, 253 id. 164; Tucker v. Duncan, 224 id. 453; Chicago Burlington and Quincy Railroad Co. v. Dickson, 143 id. 368."

We think the contention of counsel for defendant as to the notice, is entirely without merit.

Objection is made by defendant to the giving and refusing of various instructions. We have carefully examined all the instructions, both given and refused. We are of the opinion that the jury was fully and fairly instructed.

tween the notice served on the city, and the proof as to the place of the accident. It will be noted that the notice served recited that the accident happened at the intersection of Lincoln Street and Clark Street, and the proof is that it happened at Lincoln Avenue and Clark Street, in the city of Chicago. During the trial, no question was raised as to the place of the accident. Counsel for defendant, throughout the trial, as shown by the record, proceeded upon the theory that the accident happened at or near the intersection of Lincoln Avenue and Clark Street, in the city of Chicago. No question was raised as to this matter either on the motion for a new trial, or on the motion in arrest of judgment. It is presented for the first time here.

In Graham v. City of Chicago, 248 Ill. 588, there was an objection made that the plaintiff should not have been allowed to recover because there was no proof that plaintiff was ever attended by the physician named in the notice. There was also no proof offered by the defendant in that case that this physician was not the attending physician, and no objection was raised on the trial on the question, and the court said:

> "There was no mention made of the objection not raised either in the motion for a directed verdict, in the motion for a new trial, in the motion in arrest of judgment or in the assignments of error. It is too late for the first objection to be made at this time. Pickett v. Moore, 220 Ill. 32; Hickey v. Chicago Union Traction Co. 220 id. 1; Hickey v. Chicago Union Traction Co. 224 id. 492; Chicago Traction and Power Co. v. Dickson, 143 id. 368."

We think the contention of counsel for defendant in the notice is entirely without merit.

Objection is made by defendant to the giving and refusing of various instructions. We have carefully examined all the instructions, both given and refused. In view of this we think that the jury was fully and fairly instructed.

There appears to be some contrariety of opinion as to whether or not the hernia for which plaintiff was operated, was a result of the accident in question. The evidence shows that after plaintiff's operation, this afflicition, even if it resulted from the accident, was entirely removed. In view of this fact, we can arrive at no other conclusion than that the verdict and judgment entered thereon, are excessive. The judgment will, therefore, be affirmed, upon the condition, however, that plaintiff remits the sum of $3,000.00 therefrom. Otherwise, the cause is reversed and remanded.

JUDGMENT AFFIRMED ON REMITTITUR OF $3,000.00.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

There appears to be some contrariety of opinion as to whether or not the bonds for which plaintiff was operated, was a result of the accident in question. The evidence shows that after plaintiff's operation, this afflicition, even if it resulted from the accident, was entirely removed. In view of this fact, we can arrive at no other conclusion than that the verdict and judgment entered thereon, are excessive. The judgment will, therefore, be affirmed, upon the condition, however, that plaintiff remits the sum of $3,000.00 therefrom. Otherwise, the cause is reversed and remanded.

JUDGMENT AFFIRMED ON REMITTITUR OF $3,000.00.

HERRL, J. AND DENIS A. SULLIVAN, J. CONCUR.

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THE FIRST NATIONAL BANK OF CHICAGO, et al., Appellees, v. AMANDUS N. ANDERSON and MAMIE E. ANDERSON, et al., Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

285 I.A. 584

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

As shown by the notice of appeal filed in the Circuit Court of Cook County, defendants are appealing from three orders of that Court, entered in a foreclosure proceeding. The first two were entered on June 27th, 1934. The first of the two, ordered the second amended answer of Amandus N. Anderson and Mamie E. Anderson, his wife - defendants in the cause - stricken from the files. The second is a decree of foreclosure. The last of the three, is an order approving the master's report of sale and distribution, and was entered December 31st, 1934. The alleged error of the Circuit Court in entering the last two orders, is predicated upon the alleged error in striking the second amended joint answer of the defendants. Defendants insist that the motion to strike is in the nature of a demurrer to the bill, and, therefore, admits that all the facts well pleaded therein are true.

The bill to foreclose filed in this cause alleges the making of a note for $20,000.00, payable in gold coin, by defendants, the giving of a trust deed by them to secure payment of the note, and certain defaults, which, under ordinary circumstances, would entitle the plaintiffs to the relief prayed. While the answer filed denies the allegation in the bill, upon which the action is predicated, there is no contention made here that the makers had not defaulted in the payment of the note, and in the covenants contained in the trust deed.

38204

THE FIRST NATIONAL BANK OF CHICAGO, et al., Appellees,	APPEAL FROM
v.	CIRCUIT COURT
AMANDUS H. ANDERSON and MARIE E. ANDERSON, et al., Appellants.	COOK COUNTY.

2ESTA 584

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

As shown by the notice of appeal filed in the Circuit Court of Cook County, defendants are appealing from three orders of that Court, entered in a foreclosure proceeding. The first two were entered on June 27th, 1934. The first of the two, ordered the second amended answer of Amandus H. Anderson and Marie E. Anderson, his wife - defendants in the cause - stricken from the files. The second is a decree of foreclosure. The last of the three, is an order approving the master's report of sale and distribution, and was entered December 31st, 1934. The alleged error of the Circuit Court in entering the last two orders, is predicated upon the alleged error in striking the second amended joint answer of the defendants. Defendants insist that the motion to strike is in the nature of a demurrer to the bill, and, therefore, admits that all the facts well pleaded therein are true.

The bill to foreclose filed in this cause recites the making of a note for $80,000.00, payable in gold coin, by [illegible], the giving of a trust deed by them to secure payment of the note, and certain defaults, which, under ordinary circumstances, would entitle the plaintiffs to the relief prayed. While the [illegible] denies the allegation in the bill, upon which the motion is predicated, there is no contention made here that the makers had not defaulted in the payment of the note, and in the covenants contained in the trust deed.

The amended answer which was stricken sets forth that the First National Bank of Chicago, together with the Foreman Trust and Savings Bank of Chicago, and divers other banking corporations and others conspiring together to wrong and injure defendants in the premises, agreed among themselves to create an artificial demand for gold; that gold is the only commodity from which gold coin can be manufactured; that said conspirators proceeded to and did by divers means cause to be created vast quantities of promissory notes, evidences of indebtedness and other commercial paper calling for the delivery of gold coin of the United States of the then present standard of weight and fineness; that by virtue of the creation of such vast quantities of said promissory notes, evidences of indebtedness and other commercial paper calling for delivery of gold coin, a great demand was created therefor, resulting in a scarcity of, and increasing the price of, said commodity, to-wit: gold; that said conspirators fully intended the price of said commodity to increase to such an extent as to render impossible the performance of said contracts as evidenced by said promissory notes, evidences of indebtedness and other commercial paper, and as a result thereof, intended to and have brought this complaint to confiscate the security taken from these defendants; that the said indebtedness arose out of a loan of $20,000.00 to defendant from the Foreman Trust & Savings Bank of Chicago, who in return executed said notes and trust deed; that said bank was conducting in the State of Illinois the business of buying, selling, supplying in trade, gold coin used and in use in the United States of America, as a necessary commodity for a price; that said premises were then of a market value of $40,000.00; that said bank was then a member of a secret conspiracy and agreement with complainant, First National Bank of Chicago, and other banking corporations and individuals, by which it was agreed that certain restrictions

The amended answer which was stricken sets forth that the First National Bank of Chicago, together with the Corsman Trust and Savings Bank of Chicago, and divers other banking corporations and others conspiring together to wrong and injure defendants in the premises, agreed among themselves to create an artificial demand for gold; that gold is the only commodity from which gold coin can be manufactured; that said conspirators proceeded to and did by divers means cause to be created vast quantities of promissory notes, evidences of indebtedness and other commercial paper calling for the delivery of gold coin of the United States of the then present standard of weight and fineness; that by virtue of the creation of so vast quantities of said promissory notes, evidences of indebtedness and other commercial paper calling for delivery of gold coin, a great demand was created therefor, resulting in a scarcity of, and increasing the price of, said commodity, to-wit: gold; that said conspirators fully intended the price of said commodity to increase to such an extent as to render impossible the performance of said contracts as evidenced by said promissory notes, evidences of indebtedness and other commercial paper, and as a result thereof, intended to and have brought this complaint to conscience the scarcity taken from these defendants; that the said indebtedness arose out of a loan of $20,000.00 to defendant from the Corsman Trust & Savings Bank of Chicago, who in return executed said notes and trust deed; that said bank was conducting in the State of Illinois the business of buying, selling, supplying in trade, gold coin used and in use in the United States of America, as a necessary commodity [illegible]; that said premises were then of a market value of $40,000.00; that said bank was then a member of a secret conspiracy and agreement with complainant, First National Bank of Chicago, and other banking corporations and individuals, by which it was agreed that certain restrictions

in the purchase and sale of gold coin would be observed by said banks designed to bring about limitation of quantity of gold coin sold in the United States and Illinois to depress value of real assets upon which contract for delivery of gold coin, held by said banks, were secured and obtain ownership of real assets for banks through foreclosure at an extremely small outlay of gold coin on the part of said banks; that said banks agreed that after restricting sale of gold coin and causing artificial scarcity of commodity to bring about defaults in performances of contracts, no further contracts, extensions or renewals, calling for delivery of gold coin, the performance of which are to be secured by liens of mortgages on real property, would be consummated by said banks; that "on, to-wit: January, 1932," said banks, including the complainant, First National Bank of Chicago, pursuant to conspiracy, believing default in payment generally prevalent as to amount of practical destruction of realty values and presenting opportunity for gaining huge profits, placed said plan in operation by uniformly refusing to extend, make or renew said contracts and proceeded to foreclose existing liens and mortgages; that said conspirators controlled the bulk of gold coin in use in the United States; that by virtue thereof they and the First National Bank of Chicago rendered it impossible for defendants to finance, liquidate or secure gold coin to fulfill contract of obligation alleged in the bill of complaint; that said actions and conspiracy are in direct violation of an Act of the State of Illinois entitled: "An Act to provide for the Punishment of Persons, Co-Partnerships or Corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," laws of Illinois 1891, page 204, and under and by virtue of said act, particularly Section 6, that these defendants are not liable to the complainant for the matters alleged in complainant's bill of complaint; that

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in the purchase and sale of gold coin would be observed by said banks designed to bring about limitation or quantity of gold coin sold in the United States and Illinois to increase value of real assets upon which contract for delivery of gold coin, held by said banks, were secured and obtain ownership of real assets for banks through foreclosure at an extremely small outlay of gold coin on the part of said banks; that said banks agreed that after restricting sale of gold coin and causing artificial scarcity of commodity to bring about defaults in performance of contracts, no further contracts, extensions or renewals, calling for delivery of gold coin, the performance of which are to be secured by liens of mortgages on real property, would be consummated by said banks; that "on, to-wit: January, 1932," said banks, including the complainant, the at National Bank of Chicago, pursuant to conspiracy, believing default in payment generally prevalent as to amount of practical destruction of realty values and presenting opportunity for gaining huge profits, placed said plan in operation by uniformly refusing to extend, make or renew said contracts and proceeded to foreclose existing liens and mortgages; th t said conspirators controlled the bulk of gold coin in use in the United States; that by virtue thereof they and the first National Bank of Chicago rendered it impossible for defendants to finance, liquidate or secure gold coin to fulfill contract or to obligation alleged in the bill of complaint; that said acts and conspiracy are in direct violation of an act of the State of Illinois entitled: "An act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," Laws of Illinois 1891, page 204, and under and by virtue of said act, particularly Section 8, that these defendants are not liable to the complaint and for the matters alleged in complainant's bill of complaint; that

on or about, to-wit: 20th day of March, 1928, said Foreman Trust and Savings Bank was a member of said secret conspiracy under which it agreed with complainant and others to regulate and fix price of gold coin according to progress of subsequent events to secure for said conspirators and self, highest possible profits; that on or about, to-wit: January 28th, 1928, to regulate price of gold coin, said banks entered into a secret pool to fix amount of gold coin sold in the United States and Illinois; that on or about March 20th, 1928, pursuant to said plan, said Foreman Trust & Savings Bank entered into a contract with these defendants, who, without knowledge of said plan, agreed to deliver to said bank $20,000.00 in said gold coin as evidenced by contract exhibited in bill of complaint, and, in addition, to deliver to said bank $5,500.00 in gold coin as set forth in said bill; said bank, pursuing said conspiracy, required defendants to execute and deliver said mortgage; that said Foreman Bank, through said conspiracy, and the control of said gold coin, was acting with said conspirators without whose consent gold could not be secured, and said conspirators, denying consent, knew that defendants could not carry out the performance of delivery of said gold coin; that said contracts, being made pursuant to said conspiracy, are void under and by virtue of the laws and statutes of the State of Illinois, and that by reason thereof, said First National Bank, complainant, is in court with unclean hands, and should be denied relief.

The bill to foreclose was filed on October 5th, 1933, and alleges that the First National Bank of Chicago, a national banking association, Kenneth G. Smith and Adelaide Stephen, as co-trustees, under a trust created by Douglas Smith by various agreements, dated September 25th, 1922, and as such trustees, are the legal holders and owners of the certain principal note and trust deed involved here.

on or about, to-wit: 20th day of March, 1932, said Foreman Trust and Savings Bank was a member of said secret conspiracy under which it agreed with complainant and others to regulate and fix price of gold coin according to progress of announcement events to secure for said conspirators and well, highest possible profits; that on or about, to-wit: January 28th, 1932, to regulate price of gold coin, said banks entered into a secret pool to fix amount of gold coin sold in the United States and Illinois; that on or about March 27th, 1932, pursuant to said plan, said Foreman Trust & Savings Bank entered into a contract with these defendants, who, without knowledge of said plan, agreed to deliver to said bank $4,000.00 in gold coin as evidenced by contract exhibited in bill of complaint, and, in addition, to deliver to said bank $3,000.00 in gold coin as set forth in said bill; said bank, pursuing said conspiracy, required defendants to execute and deliver said mortgage; in a suit Foreman Bank, through said conspiracy, and the control of said gold coin, was acting with said conspirators without whose consent gold could not be secured, and said conspirators, demanding consent, knew that defendants could not carry out the performance of delivery of said gold coin; that said contract, being made pursuant to said conspiracy, are void under and by virtue of the laws and courts of the state of Illinois, and that by reason thereof, said first National Bank, complainant, is in court with unclean hands, and should be denied relief.

The bill to foreclose was filed on October 7th, 1932, and alleges that the First National Bank of Ohio, a national banking association, Kenneth O. Smith and Adelaide Freeman, as co-trustees, under a trust created by Douglas Smith by various agreements, dated September 28th, 1932, and as such trustees, are the legal holders and owners of the certain principal note and trust deed involved here.

As indicated by the answer which was stricken, the defenses set forth are that the contract upon which plaintiffs sued, was entered into in furtherance of a conspiracy to defraud the defendants, and is, therefore, void. It is to be noted that the First National Bank of Chicago, which is charged with wrongdoing in this answer, is suing here as one of three trustees under a trust created, that the suit is brought for and on behalf of the beneficiaries of such trust, and that there is no showing that the trustees have any interest in the property involved, other than as stated.

Defendants cite Section 5 of "An Act to provide for the punishment of persons, co-partnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," (Cahill's Revised Statutes, 1933, chapter 38, paragraph 602,) as follows: "Any contract or agreement in violation of any of the provisions of the preceding sections of this Act shall be absolutely void," as authority for the proposition that, because of the facts set forth in the answer, the contract between the parties to this suit is void, and that they, therefore, have no right of action. This provision of the Act in question is meaningless, unless it is read in connection with Sections 1 and 2 of this Act, (Cahill's Illinois Revised Statutes, 1933, chapter 38, paragraphs 598 and 599.) These sections provide:

> "598. If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party

As indicated by the answer which was strictken, the defenses set forth are that the contract upon which plaintiffs sued was entered into in furtherance of a conspiracy between the defendants, and is, therefore, void. It is to be noted that the First National Bank of Chicago, which is charged with wrongdoing in this answer, is suing here as one of three trustees under a trust created, that the suit is brought for and on behalf of the beneficiaries of such trust, and that there is no showing that the trustees have any interest in the property involved, other than as stated.

Defendants cite Section 5 of "An Act to provide for the punishment of persons, co-partnerships or corporations forming pools, trusts and combines, and made of procedure and rules of evidence in such cases." (Smith's Revised Statutes, 1937, chapter 38, paragraph 802,) as follows: "Any contract or agreement in violation of any of the provisions of the preceding sections of this Act shall be absolutely void," as authority for the proposition that because of the facts set forth in the answer, the contract between the parties to this suit is void, and so it they, therefore, have no right of action. This provision of the Act in question is meaningless, unless it is read in connection with Sections 1 and 2 of this Act, (Smith's Illinois Revised Statutes, 1937, chapter 38, paragraphs 398 and 399.) These sections provide:

"398. If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party

to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act."

"599. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article."

In Chicago Wall Paper Mills v. General Paper Co., 147 Fed. 491, the plaintiff corporation sued for paper sold to defendant. The defendant filed certain pleas, in which it was alleged that plaintiff corporation was organized for the purpose of acting as exclusive sales agent for the paper and paper products to be produced by certain manufacturing corporations located in the states of Wisconsin and Michigan, engaged in the paper industry, and it appeared that for trading purposes, there was a practical amalgamation of a number of producing companies. It was alleged that pursuant to the confederation, plaintiff corporation became the exclusive sales agent of all of these paper mills, with exclusive power to determine the extent of the output, and to fix prices arbitrarily, and that by such confederation, competition between the producing corporations was stifled; that upon the plaintiff corporation being organized, it came to the state of Illinois, complied with the requirements of the law of this state, secured a place of business, and has since such time continued to handle and sell the combined products of 21 mills in Wisconsin, Michigan, Illinois and other states, as was contemplated by the agreement of confederation, and that the alleged combination

to any pool, agreement, contract, combination or consideration to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act."

"§99. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or limit the manufacture or output of any such article."

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is violative of the statute of the state of Illinois herein quoted. In passing upon this defense, the court said:

> "It cannot be successfully contended that the contract in suit falls within the sanction of the fifth section. The contract thereby denounced as void is plainly one which directly contravenes the earlier sections; one in which the trust takes root, or by which the illicit scheme is organized. The defendant below purchased the paper in the ordinary course of business. It was a stranger to the alleged unlawful combination. The sale of the merchandise had no direct relation to the prohibitions of sections 1 and 2. The same distinction has been drawn under the federal anti-trust act (Hopkins v. United States, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 615, 19 Sup. Ct. 50, 43 L. Ed. 300), and this court has several times held that contracts founded upon a good consideration are collateral to the unlawful scheme or combination and not tainted thereby. Denneby v. McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; Star Brewery Co. v. United Breweries. 121 Fed. 713, 58 C. C. A. 133; Harrison v. Glucose Co. 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915."

In Lafayette Bridge Co. v. City of Streator, 105 Fed. 729, suit was brought on a contract for the erection of a bridge, and the same defenses, among others, were urged as are urged here. There was no question raised, but that the work was done as it was contracted to be done, and the court said:

> "The defendant is, in this suit, attempting to avail itself in a collateral proceeding of a defense based on a fact which should be determined in a direct proceeding. In other words, before a defendant can evade the payment of the purchase price of commodities, actually received, on the ground that the seller is a trust or combination in restraint of trade, in contravention of the statute, there should be an adjudication of a competent tribunal, in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination in the sense contemplated by the statute. This is in accord with the ordinary rules of statutory construction. The practical working of any other rule could not fail to emphasize the justice and necessity of so holding in cases similar to the one at bar. It cannot be insisted that the decision in one case would be binding or even persuasive in any other case. Each suit to recover purchase money, in which the statute is pleaded by way of defense, would call for a separate and distinct determination of the legal status of the plaintiff, thereby making the claim for the purchase money merely an incidental issue. This would be true even if the amount involved were but five dollars, and the case were before a justice of the peace. The result would depend upon the varying conditions of each case as affected by the skill of lawyers, the bias of jurors, and other attendant

is violative of the statute of the state of Illinois herein noted.

In passing upon this defense, the court said:

> "It cannot be successfully contended that the contract in suit falls within the exception of the fifth section. The contract thereby denounced as void is plainly one which directly contravenes the earlier sections; one in which the trust takes root, or by which the illicit scheme is organized. The defendant below purchased the beer in the ordinary course of business. It was a stranger to the alleged unlawful combination. The sale of the merchandise had no direct relation to the prohibitions of sections 1 and 2. The same distinction has been drawn under the federal anti-trust act (Hopkins v. United States, 171 U. S. 578, 587, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. United States, 171 U. S. 604, 619, 19 Sup. Ct. 50, 43 L. Ed. 300), and this court has several times held that contracts founded upon a good consideration are collateral to the unlawful scheme or combination and not tainted thereby. Dennehy v. Moffitt, 58 Ill. 488, 30 O. O. A. 422, 41 L. R. A. 639; Star Brewery Co. v. United Breweries, 181 Ill. 212, 55 O. O. A. 129; Harrison v. Glucose Co. 116 Ill. 304, 56 O. O. A. 464, 58 L. R. A. 913."

In Lafayette Bridge Co. v. City of Streator, 135 Ill. 729, suit was brought on a contract for the erection of a bridge, and the same defenses, among others, were urged as are urged here. There was no question raised, but that the work was done as it was contracted to be done, and the court said:

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> circumstances. This would inevitably lead to such confusion as would force federal courts to so construe the statutes as to protect the due and regular administration of justice from unconscionable prolixity and irreconcilable adjudications."

There is no showing here that the plaintiff in the suit ever demanded that defendants pay in gold coin, as the contract provides, or that defendants ever made any tender of legal tender notes of the United States in payment of the amounts which they admit are due under the terms of the contract, except for the alleged defenses set up in this answer. Also, the court will take judicial notice of the executive order of the President of the United States, promulgated April 5th, 1933, and the resolution of Congress adopted June 5th, 1933, which provides that obligations payable by their terms in gold coin "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

We are of the opinion that the defenses set forth in the answer to the bill filed in this cause, are without merit and that the court was fully justified in striking the answer. The decree affirming the Master's report of sale is affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

circumstances. This would inevitably lead to such confusion as would force federal courts to so construe the et tutes as to protect the due and regular administration of justice from unconscionable prolixity and irreconcilable adjudications."

There is no showing here that the plaintiff in the suit ever demanded that defendants pay in gold coin, as the contract provides, or that defendants ever made any tender of legal tender notes of the United States in payment of the amounts which they admit are due under the terms of the contract, except for the alleged defenses set up in this answer. Also, the court will take judicial notice of the executive order of the President of the United States, promulgated April 5th, 1933, and the resolution of Congress adopted June 5th, 1933, which provides that obligations payable by their terms in gold coin "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

We are of the opinion that the defenses set forth in the answer to the bill filed in this cause, are without merit and that the court was fully justified in striking the answer. The decree affirming the Master's report of sale is affirmed.

AFFIRMED.

HERSEL, J. AND DERIS E. SULLIVAN, J. CONCUR.

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38212

JOSEPH PERLMAN, Appellee, v. SAM SAMSON, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 584

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago, entered on February 23rd, 1935, for the sum of $364.00 and costs of suit.

Three statements of claim were filed in the Municipal Court by plaintiff against defendant. In the first, it is charged that plaintiff cashed a check for defendant, payable in cash, for the sum of $124.00, drawn on the Liberty Trust and Savings Bank, and signed by the defendant; that the defendant wilfully, and with malicious intent to cheat and defraud the defendant, represented to the plaintiff that the check would be paid when presented to the bank for payment, but that payment was refused, and that the check was returned to plaintiff marked "not sufficient funds." The second statement of claim is substantially the same as the first, except that the allegation is that a check for $120.00, drawn on the same bank and dated March 18th, 1931, was cashed by plaintiff, and when presented to the bank, payment was refused, and it was returned marked "not sufficient funds". The third statement of claim is the same as the other two, except that it charges that the check was dated November 13th, 1930, and was for $120.00.

Defendant filed an affidavit of merits in each case, and in each of these affidavits of merit, he denied that the defendant cashed the checks, as alleged, for the purpose of wilfully and maliciously defrauding the plaintiff, but it is alleged that each of the checks

38212

JOSEPH PERLMAN, Appellee, v. SAM SAMSON, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 384

MR. PRESIDING JUSTICE MAIL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago, entered on February 23d, 1933, for the sum of $384.00 and costs of suit.

Three statements of claim were filed in the Municipal Court by plaintiff against defendant. In the first, it is charged that plaintiff cashed a check for defendant, payable in cash, for the sum of $124.00, drawn on the Liberty Trust and Savings Bank, and signed by the defendant; that the defendant wilfully, and with malicious intent to cheat and defraud the defendant, represented to the plaintiff that the check would be paid when presented to the bank for payment, but that payment was refused, and that the check was returned to plaintiff marked "not sufficient funds." The second statement of claim is substantially the same as the first, except that the allegation is that a check for $130.00, drawn on the same bank and dated March 18th, 1931, was cashed by plaintiff, and when presented to the bank, payment was refused, and it was returned marked "not sufficient funds". The third statement of claim is the same as the other two, except that it charges that the check was dated November 13th, 1930, and was for $130.00.

Defendant filed an affidavit of merits in each case, and in each of these affidavits of merit, he denied that the defendant cashed the checks, as alleged, for the purpose of wilfully and maliciously defrauding the plaintiff, but it is alleged that each of the checks

sued on was part of a series of checks given to the plaintiff, all of which were undated, and in which the amounts were left blank; that the checks were given to plaintiff to be used in payment of loans made to the defendant by the plaintiff over a period of eight or nine months, and that each of the checks, as to the amount and date, were filled in by the plaintiff, and that plaintiff in each case, charged the defendant an interest rate of 25% per month. It is further alleged in each of the affidavits of merit that plaintiff was not licensed to do business under the small loans act in the state of Illinois, and that the interest rate was usurious.

Upon the issues made by the statements of claim and the affidavits of merit, the cases were apparently consolidated for a hearing, and after a hearing upon the evidence adduced, they were submitted to a jury, which returned a verdict of not guilty. The checks upon which the actions were brought, were introduced in evidence, and there was no proof of any offer of payment, and no evidence was introduced to refute the charge that when the checks for the amounts mentioned were presented to the bank for payment, payment was refused. After the verdict for defendant was returned to the court, upon motion of plaintiff, the court entered judgment for plaintiff *non obstante veredicto*.

The defendant was called as a witness under Section 60 of the Municipal Court Act, and testified that he had received money on the checks which he had given plaintiff.

Plaintiff testified that he cashed the checks for defendant at various times, and for the amounts shown on the face thereof, and that each time defendant represented to him that there was sufficient money in the bank to pay the checks and that the reason he kept the checks until April, 1931, was because he was ill. He testified on cross examination that he wrote out the checks and that defendant signed them.

sued on was part of a series of checks given to the plaintiff, all of which were undated, and in which the amounts were left blank; that the checks were given to plaintiff to be used in payment of loans made to the defendant by the plaintiff over a period of eight or nine months, and that each of the checks, as to the amount and date, were filled in by the plaintiff, and that plaintiff in each case, charged the defendant an interest rate of 3% per month. It is further alleged in each of the affidavits of merit that plaintiff was not licensed to do business under the small loans act in the state of Illinois, and that the interest rate was usurious.

Upon the issues made by the statements of claim and the affidavits of merit, the cases were consecutively consolidated for hearing, and after a hearing upon the evidence adduced, they were submitted to a jury, which returned a verdict of not guilty. The checks upon which the actions were brought, were introduced in evidence, and there was no proof of any offer of payment, and no evidence was introduced to refute the charge that when the checks for the amounts mentioned were presented to the bank for payment, payment was refused. After the verdict for defendant was returned to the court, upon motion of plaintiff, the court entered judgment for plaintiff <u>non obstante veredicto</u>.

The defendant was called as a witness under section 60 of the Municipal Court Act, and testified that he had received money on the checks which he had given plaintiff.

Plaintiff testified that he cashed the checks for defendant at various times, and for the amounts shown on the face thereof, and that each time defendant represented to him that there was sufficient money in the bank to pay the checks and that the reason he kept the checks until April, 1931, was because he was ill. He testified on cross examination that he wrote out the checks and that defendant signed them.

One Herman Mendelson, a witness for plaintiff, testified that he had a conversation with the defendant about May, 1931, at which time he requested the defendant to pay plaintiff his money, and that defendant told the witness he would do so as soon as he was able.

One Harry Rosenfield testified to the same effect as the last witness.

The defendant testified that he had not made the statements testified to by the last two witnesses.

The court heard the witnesses, and we see no reason for disturbing its finding. Therefore, the judgment is affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

One Herman Mendelson, a witness for plaintiff, testified that he had a conversation with the defendant about May, 1871, at which time he requested the defendant to pay plaintiff his money, and that defendant told the witness he would do so as soon as he was able.

One Harry Rosenfield testified to the same effect as the last witness.

The defendant testified that he had not made the statements testified to by the last two witnesses.

The court heard the witnesses, and we see no reason for disturbing its finding. Therefore, the judgment is affirmed.

AFFIRMED.

HERRIN, J., AND DENIS E. SULLIVAN, J., CONCUR.

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38237

JULIA COBB, as Administratrix of the Estate of Louis Cobb, Deceased,

Appellant,

v.

RUSH BUTLER, JR.,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

285 I.A. 585

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal, plaintiff seeks the reversal of a judgment entered against her on April 3rd, 1935, in the Superior Court of Cook County, for costs of suit. The action against defendant is predicated upon the charge that her husband, Louis Cobb, came to his death on October 3rd, 1934, because of injuries alleged to have been sustained on August 17, 1934, through the negligence and wilful and wanton conduct of the defendant. The trial was before a jury, and after hearing the evidence offered on behalf of plaintiff, the court directed the jury to find the defendant not guilty.

There are two counts in the declaration filed in the cause. In the first, it is charged that on August 17th, 1934, the defendant, as the owner of an automobile, was operating it in a northerly direction along Michigan Avenue in the city of Chicago, and that Louis Cobb was a pedestrian lawfully and rightfully along Michigan avenue, at or near the intersection of Chestnut Street, and that while in the exercise of ordinary care on the part of Cobb, and through the carelessness, negligence and improper conduct, of the defendant, Cobb was knocked down and suffered severe injuries, and that as a result of such injuries, Cobb died on the date mentioned. It is specifically charged in the declaration that at the time of the accident, defendant was driving his automobile at a speed greater than was reasonable and proper, having regard for the condition of the traffic and the use

38327

JULIA COBB, as Administratrix of the Estate of Louis Cobb, Deceased, Appellant,	APPEAL FROM SUPERIOR COURT YOOK COUNTY.
v.	
RUSH BUTLER, JR., Appellee.	28E I.A. 38E

MR. PRESIDING JUSTICE NAIL DELIVERED THE OPINION OF THE COURT.

By this appeal, plaintiff seeks the reversal of a judgment entered against her on April 3rd, 1938, in the Superior Court of Cook County, for costs of suit. The action against defendant is predicated upon the charge that her husband, Louis Cobb, came to his death on October 3rd, 1934, because of injuries alleged to have been sustained on August 17, 1934, through the negligence and willful and wanton conduct of the defendant. The trial was before a jury, and after hearing the evidence offered on behalf of plaintiff, the court directed the jury to find the defendant not guilty.

There are two counts in the declaration filed in the cause. In the first, it is charged that on August 17th, 1934, the defendant, as the owner of an automobile, was operating it in a northerly direction along Michigan Avenue in the city of Chicago, and that Louis Cobb was a pedestrian lawfully and rightfully along Michigan Avenue, at or near the intersection of Chestnut Street, and that while in the exercise of ordinary care on the part of Cobb, and through the careless, negligence and improper conduct, of the defendant, Cobb was knocked down and suffered severe injuries, and that as a result of such injuries, Cobb died on the date mentioned. It is specifically charged in the declaration that at the time of the accident, defendant was driving his automobile at a speed greater than was reasonable and proper, having regard for the condition of the traffic and the use

of the public highway in question, in violation of Section 22 of the Motor Vehicle Law. Also, that the defendant negligently operated and drove the automobile at a speed greatly in excess of 15 miles an hour through a closely built up business district in the city of Chicago; that the defendant neglected to sound a horn, or give warning of the approach of the automobile, in violation of Section 40 of the Motor Vehicle Law. It is also charged that the defendant failed to have his automobile equipped with good and sufficient brakes, in violation of Section 21 of the Motor Vehicle Law, and in negligently operating the automobile at a high and dangerous rate of speed. Count two charges that the defendant wilfully, wantonly and maliciously, and with conscious indifference for and utter disregard of the rights and safety of the intestate, operated the automobile at the time and place in question.

F. Bertram Scent, a police officer connected with the Chicago Park System, testified in substance that at about 2:35 in the morning of August 17th, 1934, he was going north on Michigan Avenue, and that the accident in question happened at Chestnut Street and Michigan Avenue; that Michigan Avenue is a boulevard running north and south, and that Chestnut Street crosses it east and west, and that it is about 25 or 30 feet from the east side of Michigan Avenue to the center of the street; that there was an island light at both the north and south intersection of Chestnut Street; that the lights were not operating on the night in question, as they were installing a new lighting system at the time; that the night was dry and the roadway was good; that it all happened in the city of Chicago; that he saw the decedent just as he, decedent, got down off the curbing at the southeast corner of Michigan Avenue and Chestnut Street; that the witness at that time was at Chicago avenue,

of the public highway in question, in violation of section 21 of the Motor Vehicle Law. Also, that the defendant negligently operated and drove the automobile at a speed greatly in excess of 15 miles an hour through a closely built up business district in the city of Chicago; that the defendant neglected to sound a horn, or give warning of the approach of the automobile, in violation of Section 40 of the Motor Vehicle Law. It is also charged that the defendant failed to have his automobile equipped with good and sufficient brakes, in violation of Section 21 of the Motor Vehicle Law, and in negligently operating the automobile at a high and dangerous rate of speed. Count two charges that the defendant wilfully, wantonly and maliciously, and with conscious indifference for and utter disregard of the rights and safety of the intestate, operated the automobile at the time and place in question.

F. Bertram Scott, a police officer connected with the Chicago Park System, testified in substance that at about 3:35 in the morning of August 17th, 1934, he was going north on Michigan Avenue, and that the accident in question happened at Chestnut Street and Michigan Avenue; that Michigan Avenue is a boulevard running north and south, and that Chestnut Street crosses it east and west, and that it is about 25 or 30 feet from the east side of Michigan Avenue to the center of the street; that there was an island light at both the north and south intersection of Chestnut Street; that the lights were not operating on the night in question, as they were installing a new lighting system at the time; that the night was dry and the roadway was good; that it all happened in the city of Chicago; that he saw the decedent just as he, decedent, got down off the curbing at the southeast corner of Michigan Avenue and Chestnut Street; that the witness at that time was at Chicago Avenue

south of and a full block away; that he saw decedent walking west; that he saw him continuously from the time he left the curbing until he was struck by the automobile; that the witness was riding in a car during all the times in question, and was traveling north at a speed of about 20 miles an hour; that he saw defendant's car coming north, and that it passed the witness on the left, and that it was then going at from 30 to 35 miles an hour, and that at that time, he saw decedent walking in a westerly direction; that after decedent had passed beyond the half of the east section of the drive, the witness saw the decedent hasten his speed, and that when decedent had reached a point a foot or two from the island light, he was struck by defendant's car. The witness stated that the safety island, to which he referred, stands in the center of the street. This witness also testified that there were no obstructions between him and the automobile which struck the man, and that the street was lighted, and the lighting conditions were good; that when the man was struck, he was thrown in the air and carried over to the west side of the north island light, a distance of about 30 feet, and that the car proceeded about 150 feet further and stopped. The witness further testified that at no time did he hear any signal, nor any horn blown; that he and an associate officer picked the decedent up, that he was then unconscious, and that he was taken to the Passavant Hospital. This witness stated that Michigan Avenue at the area in question is a built-up business and residence district. On cross-examination, this witness stated that the lights on both his own and the other car were lighted, and that there was a full view down the street.

John B. Casey, another police officer, who accompanied officer Scent, testified in substance that on the night and at the time in question, he and Sergeant Scent were riding in a squad car

south of and a full block away; that he saw deceased walking; that he saw him continuously from the time he left the corning until he was struck by the automobile; that the witness was riding in a car during all the times in question, and was travelling north at a speed of about 30 miles an hour; that he saw defendant's car coming north, and that it passed the witness on the left, and that it was then going at from 30 to 35 miles an hour, and that at that time, he saw deceased walking in a westerly direction; that after deceased had passed beyond the half of the east section of the drive, the witness saw the deceased beaten his speed, and that when deceased had reached a point a foot or two from the island light, he was struck by defendant's car. The witness stated that the safety island, to which he referred, stands in the center of the street. This witness also testified that there were no obstructions between him and the automobile which struck the man, and that the street was lighted, and the lighting conditions were good; that when the man was struck, he was thrown in the air and carried over to the west side of the north island light, a distance of about 30 feet, and that the car proceeded about 150 feet further and stopped. The witness further testified that at no time did he hear any signal, nor any horn blown; that he and an associate officer picked the deceased up, that he was then unconscious, and that he was taken to the Passavant Hospital. This witness stated that Michigan Avenue at the area in question is a built-up business and residence district. On cross-examination, this witness stated that the lights on both his own and the other car were lighted, and that there was a full view down the street.

John B. Casey, another police officer, who accompanied officer Scant, testified in substance that on the night and at the time in question, he and sergeant Scant were riding in a squad car

north on Michigan Avenue, and that he witnessed the accident. This witness stated that he saw the decedent just after they had passed Chicago Avenue, and that decedent was then stepping off the curb at Chestnut Street going west; that at that time the witness did not notice any traffic or cars; that as they were passing Pearson Street, which is a block away from where the accident happened, a car passed them going north at a speed of 30 or 35 miles an hour; that he saw the decedent crossing the street all the way across until he was struck; that as the decedent passed the center of the east drive, decedent quickened his pace; that he, the witness, heard no signal from the other car, and that at the time of the collision, the decedent was about two or three feet from the center of the street; that decedent was thrown in the air and carried to the north island light about 25 or 30 feet, and that the automobile proceeded from 200 to 225 feet from where the accident happened before it stopped; that he, with the other officer, took the injured man to the Passavant Hospital.

Julia Cobb, executrix, and the wife of the decedent, testified that at the time of the accident, the decedent was 27 years of age; that they have one child, born in 1934; that at the time of the accident, her husband was employed at 22nd & Michigan Avenue, and that he was then earning $18.00 per week, including his meals, and that at that time, decedent's condition of health was good, as were his habits; that he was sober and industrious, and took care of his family. This witness stated that she saw decedent at about 5 o'clock in the morning after the accident, at the Passavant Hospital, and that at that time, he was conscious; that he was in the hospital from the date of the injury in August until October 3rd, 1934, when he died, and that the child is still living.

north on Michigan Avenue, and that he witnessed the accident. This witness stated that he saw the decedent just after they had passed Chicago Avenue, and that decedent was then stepping off the curb at Chestnut Street going west; that at that time the witness did not notice any traffic or cars; that as they were passing Superior Street, which is a block away from where the accident happened, a car passed them going north at a speed of 30 or 35 miles an hour; that he saw the decedent crossing the street all the way across until he was struck; that as the decedent passed the center of the east drive, decedent quickened his pace; that he, the witness, heard no signal from the other car, and that at the time of the collision, the decedent was about two or three feet from the center of the street; that decedent was thrown in the air and carried to the north island light about 25 or 30 feet, and that the automobile proceeded from 200 to 225 feet from where the accident happened before it stopped; that he, with the other officer, took the injured man to the Passavant Hospital.

Julia Cobb, executrix, and the wife of the decedent, testified that at the time of the accident, the decedent was 37 years of age; that they have one child, born in 1924; that at the time of the accident, her husband was employed at 2244 Michigan Avenue, and that he was then earning $18.00 per week, including his meals, and that at that time, decedent's condition of health was good, as were his habits; that he was sober and industrious, and took care of his family. This witness stated that she saw decedent at about 5 o'clock in the morning after the accident, at the Passavant Hospital, and that at that time, he was conscious; that he was in the hospital from the date of the injury in August until October 3rd, 1924, when he died, and that the child is still living.

Oral argument was had, but neither in his brief, nor in his oral argument, does counsel for defendant deny that defendant was guilty of negligence at the time and place in question. The position taken by counsel is that the burden was upon the plaintiff to prove the exercise of due care by the intestate at the time and place in question, and that there was no evidence whatever to sustain such burden; that there being no dispute in this regard, and no basis for contradictory inferences, the contributory negligence of plaintiff's intestate was a matter of law for the court, and also that there was no evidence from which the jury would have been justified in finding that the defendant was guilty of willful and wanton conduct.

In McFarlane v. Chicago City Ry. Co., 288 Ill. 476, in passing upon the question as to whether or not the court erred in refusing to give a peremptory instruction to find the defendant not guilty at the close of plaintiff's case, the court said:

> "The only question which the court has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the declaration. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; Woodman v. Illinois Trust and Savings Bank, 211 id. 578.")

In English v. Gordon, 231 Ill. App. 316, an appeal was taken to this court from a judgment obtained by plaintiff, in which the charge was made that the defendant's automobile struck the plaintiff at the intersection of 53rd and Hyde Park Boulevard, Chicago. It was urged on appeal that the trial court should have directed a verdict of not guilty at the close of plaintiff's case. Plaintiff, in that case, was crossing Hyde Park Boulevard when she was struck by defendant's car, and it was there urged, as it is urged here, that plaintiff was guilty of contributory negligence. In passing upon this question, this court said:

Oral argument was had, but neither in his brief, nor in his oral argument, does counsel for defendant deny that defendant was guilty of negligence at the time and place in question. The position taken by counsel is that the burden was upon the plaintiff to prove the exercise of due care by the intestate at the time and place in question, and that there was no evidence whatever to sustain such burden; that there being no dispute in this regard, and no basis for contradictory inferences, the contributory negligence of plaintiff's intestate was a matter of law for the court, and also that there was no evidence from which the jury would have been justified in finding that the defendant was guilty of willful and wanton conduct.

In McFarlane v. Chicago City Ry. Co., 288 Ill. 276, in passing upon the question as to whether or not the court erred in refusing to give a peremptory instruction to find the defendant not guilty at the close of plaintiff's case, the court said:

> "The only question which the court has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the declaration. (Libby, McNeill & Libby v. Cook, 148 Ill. 202; Goodman v. Illinois Trust and Savings Bank, 171 Ill. 272.)"

In Duffian v. Gordon, 221 Ill. App. 314, an appeal was taken to this court from a judgment obtained by plaintiff, in which the charge was made that the defendant's automobile struck the plaintiff at the intersection of 63rd and Hyde Park Boulevard, Chicago. It was urged on appeal that the trial court should have directed a verdict of not guilty at the close of plaintiff's case. Plaintiff, in that case, was crossing Hyde Park Boulevard when she was struck by defendant's car, and it was there urged, as it is urged here, that plaintiff was guilty of contributory negligence. In passing upon this question, this court said:

"Nor can it be said that it was negligence per se under the circumstances that plaintiff did not look again to see the car until it came suddenly upon her. She might well have assumed that if the car were driven at a reasonable and the ordinary speed for such locality she had ample time to cross ahead of it, and therefore, she was surprised and confused when she found it close upon her as she reached the middle of the crossing. We need not discuss the familiar doctrines that each party has an equal right to passage at a street crossing and that he must exercise reasonable care for his own safety and that of others. Each case, however, presents its own peculiar circumstances, from which it is the particular province of the jury to decide the facts. And it is simply a question in this court whether we can say that the jury's conclusion is manifestly against the weight of the evidence. In this case we cannot so say. And in view of the appalling loss of life on public streets in our large cities resulting frequently from disregard by motorists of the fact that pedestrians have equal rights at street crossings, we are not disposed to say that when a pedestrian becomes bewildered by such disregard and is suddenly called upon to act for his own safety, his misjudgment of the course the automobile will take is contributory negligence. We think there was ample evidence to justify the jury's finding that plaintiff exercised reasonable care for her own safety and that defendant was negligent." (Italics ours)

In this case, as is so clearly stated in English v. Gordon, supra, the plaintiff's intestate had the same right to the use of the street as the defendant. He was crossing at a street intersection where people usually cross, and the question as to whether or not he was in the exercise of ordinary care for his safety under all the circumstances appearing from the evidence, should have been left to the jury. We are of the opinion that the court was in error in directing the jury to find the defendant not guilty. Therefore, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

"Nor can it be said that it was negligence per se under the circumstances that plaintiff did not look again to see the car until it came suddenly upon her. She might well have assumed that if the car were driven at a reasonable and the ordinary speed for such locality she had ample time to cross ahead of it, and therefore, she was surprised and confused when she found it close upon her as she reached the middle of the crossing. We need not discuss the familiar doctrines that each party has an equal right to passage at a street crossing and that he must exercise reasonable care for his own safety and that of others. Each case, however, presents its own peculiar circumstances. From which it is the particular province of the jury to decide the facts. And it is simply a question in this court whether we can say that the jury's conclusion is manifestly against the weight of the evidence. In this case we cannot so say. And in view of the appalling loss of life on public streets in our large cities resulting frequently from disregard by motorists of the fact that pedestrians have equal rights at street crossings, we are not disposed to say th t when a pedestrian becomes bewildered by such disregard and is suddenly called upon to act for his own safety, his misjudgment of the course the automobile will take is contributory negligence. We think there was ample evidence to justify the jury's finding that plaintiff exercised reasonable care for her own safety and that defendant was negligent." (Italics ours)

In this case, as is so clearly stated in En Lian v. Gordon, supra, the plaintiff's intestate had the same right to the use of the street as the defendant. He was crossing at a street intersection where people usually cross, and the question as to whether or not he was in the exercise of ordinary care for his safety under all the circumstances appearing from the evidence, should have been left to the jury. We are of the opinion that the court was in error in directing the jury to find the defendant not guilty. Therefore, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

HERSEL, J., AND DENIS E. SULLIVAN, J., CONCUR.

38299

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IN THE MATTER OF THE ESTATE OF JOHN W. LALLITHAN, Deceased,

ALBERT B. FULTON, doing business as MADISON OIL COMPANY,

Appellee,

v.

GERTRUDE P. LALLITHAN, Administratrix of the Estate of John W. Lallithan, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

285 I.A. 585

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Administratrix of the Estate of John W. Lallithan, deceased, from an order of the Circuit Court of Cook County allowing the claim of Albert B. Fulton, doing business as Madison Oil Company, against such estate for the sum of $5,000.00. The cause was heard in the Circuit Court without a jury, on appeal from the Probate Court of Cook County, where the claim was filed and where, after a hearing before that court, the claim was disallowed.

In his lifetime, and for some considerable time prior to his death, John W. Lallithan was the manager of the gasoline and coal business of the claimant, who was a wholesale and retail distributor of gasoline, retail dealer in coal, and the manufacturer and distributor of ice. Claimant's gasoline business was operated under the name of "Madison Oil Company". The claim is based upon the charge that Lallithan, as manager of the Madison Oil Company, either sold on his own account, or appropriated to his own use, 86,666 gallons of gasoline of the value of $7,632.18, which sum claimant represents to be the fair market value of the gasoline at the time it was so appropriated.

The decedent, according to the testimony, was in charge

38299

IN THE MATTER OF THE ESTATE OF JOHN W. BAILITHAN, Deceased,	APPEAL FROM
ALBERT R. FULTON, doing business as MADISON OIL COMPANY, Appellee, v. GERTRUDE P. BAILITHAN, Administratrix of the Estate of John W. Bailithan, Deceased, Appellant.	CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE MAHN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the administratrix of the estate of John W. Bailithan, deceased, from an order of the circuit court of Cook County allowing the claim of Albert R. Fulton, doing business as Madison Oil Company, against such estate for the sum of $3,000.00. The cause was heard in the Circuit Court without a jury, on appeal from the Probate Court of Cook County, where the claim was filed and where, after a hearing before that court, the claim was disallowed.

In his lifetime, and for some considerable time prior to his death, John W. Bailithan was the manager of the gasoline and coal business of the claimant, who was a wholesale and retail distributor of gasoline, retail dealer in coal, and the manufacturer and distributor of ice. Claimant's gasoline business was operated under the name of "Madison Oil Company". The claim is based upon the charge that Bailithan, as manager of the Madison Oil Company, either sold on his own account, or appropriated to his own use, 86,888 gallons of gasoline of the value of $[illegible], which sum claimant represents to be the fair market value of the gasoline at the time it was so appropriated.

The decedent, according to the testimony, was in charge

of the office and yards of claimant, looked after truck deliveries of gasoline, and directed the bookkeeper as to how entries should be made when gasoline was received in tank car lots. The record indicates that when claimant purchased gasoline, it would be delivered to his,claimant's, yard in tank cars, and that invoices would be received by Lallithan from the shipper, showing in the case of each shipment and receipt of gasoline by the claimant, the net amount of gasoline to be paid for. In each case there was an allowance made for shrinkage, due to temperature. The course of business shows that in each instance, checks were issued in full for all receipts of gasoline as shown by an invoice accompanying the shipment. It is further shown that each of these tank cars had stamped upon it its capacity, and that in each case the car was inspected when it came into the claimant's yard. After being inspected, Lallithan caused an entry to be made in a book kept for that purpose, and known as the "car book", which also showed the car number, number of gallons contained in each car, and the amount of the invoice.

Mary Dunn, the bookkeeper of the claimant, testified that she had been in Fulton's employ for fourteen years, and that Lallithan was employed there as office manager, and that the witness worked under his supervision; that invoices were received from shippers of gasoline, on which were stated the number of gallons in each shipment; that when the gasoline came into the yard in carloads, they were inspected by the yardman, or gasoline salesman; that when carload lots of gasoline came in, entries would be made in the car book showing the car number, the number of gallons received, and the amount of the invoice. While testifying, this witness had before her this car record book showing the entries for the years 1929 and 1930, and she stated that such book had been kept in the same manner and for the same purpose some years prior to that time. She also

of the office and yards of claimant, looked [illegible] truck deliveries of gasoline, and directed the bookkeeper [illegible] how entries should be made when gasoline was received in tank cars. The record indicates that when claimant purchased gasoline, it would be delivered to his claimant's yard in tank cars, and that invoices would be received by Laiithen from the shipper, showing in the case of each shipment and receipt of gasoline by the claimant, the net amount of gasoline to be paid for. In each case there was an allowance made for shrinkage, due to temperature. The course of business shows that in each instance, checks were issued in full for all receipts of gasoline as shown by an invoice covering anything the shipment. It is further shown that each of these tank cars had stamped upon it its capacity, and that in each case the car was inspected when it came into the claimant's yard. After being inspected, Laiithen caused an entry to be made in a book kept for that purpose, and known as the "car book", which also showed the car number, number of gallons contained in each car, and the amount of the invoice.

Mary Dunn, the bookkeeper of the claimant, testified that she had been in Fulton's employ for fourteen years, and that Laiithen was employed there as office manager, and that the witness worked under his supervision; that invoices were received from shippers of gasoline, on which were stated the number of gallons in each shipment; that when the gasoline came into the yard in tank cars they were inspected by the yardman, or gasoline engineer; that when carload lots of gasoline came in, entries would be made in the car book showing the car number, the number of gallons received, and the amount of the invoice. While testifying, the witness had before her this car record book showing the entries for the years 1929 and 1930, and she stated that such book had been kept in the same manner and for the same purpose some years prior to that time. She also

stated that sometimes Lallithan would make the entries in the book, and that sometimes the witness would make such entries, but that all of her work was done under Lallithan's supervision and direction. She also testified that an inventory book was kept, which contained a record of the inventory of the gasoline, and that sometimes Lallithan made entries in this book, and sometimes the witness made entries therein. She was shown a certain invoice received from the American Petroleum Company for a carload of gas, and she testified that this invoice showed that there was a shipment of 10,066 gallons, and the check was made out by Fulton, the claimant, for the price of this shipment, and that an entry was made in the car book showing the number of gallons indicated by the invoice. She further testified that thereafter, at the direction of Lallithan, she had the entry in the car book changed so as to show that the number of gallons received was 8,066 gallons, instead of 10,066 gallons, which entry indicated a shortage of 2,000 gallons; that as to another invoice which showed a shipment of 9,974 gallons, at the direction of Lallithan, she made an entry in the car book which showed the receipt of only 7,774 gallons; that in the case of another shipment, the invoice indicated a shipment and receipt by claimant of 10,223 gallons, when the entry in the car book showed a receipt of but 8,223 gallons, but that a check was given in payment for 10,223 gallons; that originally the entry in the car book showed a shipment and receipt by claimant of 10,223, but that this entry had been changed to 8,223 gallons, and that she did not identify the change as having been made by her. She further testified that nobody could work on the books but the witness and Mr. Lallithan; that in the case of another invoice received by claimant's office, the invoice and car book originally showed a shipment and receipt of 10,271 gallons, but the figures had been changed to show a receipt of 8,271 gallons, but that a check had

stated that sometimes Lalithan would make the entries in the book, and that sometimes the witness would make such the ies, but that all of her work was done under Lalithan's supervision and direction. She also testified that an inventory book was kept, which contained a record of the inventory of the gasoline, and that sometimes Lalithan made entries in this book, and sometimes the witness made entries therein. She was shown a certain invoice received from the American Petroleum Company for a shipment of gas, and she testified that this invoice showed that there was a shipment of 10,388 gallons and the check was made out by Lalithan, the claimant, for the price of this shipment, and that an entry was made in the car book showing the number of gallons indicated by the invoice. She further testified that thereafter, at the direction of Lalithan, she had the entry in the car book changed so as to show that the number of gallons received was 8,088 gallons, instead of 10,388 gallons, which entry indicated a shortage of 2,300 gallons; that an another invoice which showed a shipment of 9,374 gallons, at the direction of Lalithan, she made an entry in the car book which showed the receipt of only 7,774 gallons; that in the case of another shipment, the invoice indicated a shipment and receipt by claimant of 10,[illegible] gallons when the entry in the car book showed a receipt of only [illegible] gallons but that a check was given in payment for 10,[illegible] gallons; that originally the entry in the car book showed a shipment and receipt by claimant of 10,288, but that this entry had been changed to [illegible] gallons, and that she did not identify the change as having been made by her. She further testified that nobody could work on the books but the witness and Mr. Lalithan; that in the case of another invoice received by claimant's office, the invoice and car book originally showed a shipment and receipt of 10,471 gallons, but the figures had been changed to show a receipt of 8,471 gallons, but that a check had

been given in payment for 10,271 gallons. She also testified that in each case of the giving of these checks, they were made out either by Lallithan or by the witness at Lallithan's suggestion, and signed by Fulton, the claimant. She identified another invoice showing a shipment and invoice of 10,209 gallons, but that the car record book showed the receipt of but 8,209 gallons, and that in this instance, Lallithan told the witness to reduce the entry from 10,209 gallons to 8,209 gallons. Another invoice identified by the witness showed a shipment, and an original receipt as shown by the car book of 10,298 gallons. The witness testified that after the original entry had been made in the car book, at the direction of Lallithan, she changed the figures so as to indicate 8,298 gallons instead of 10,298 gallons. In another instance, the invoice showed a shipment of 10,267 gallons, and the witness testified that at the direction of Lallithan, she made the entry in the car book show a receipt of 8,267 gallons. The next item testified to by the witness was of the same character, where the invoice showed a shipment of 10,264 gallons, and where the witness, at the direction of Lallithan, made an entry in the car book showing the receipt of 8,264 gallons. The next item identified by the witness was of the same character, where the invoice showed a shipment of 10,239 gallons, and the car book showed the receipt of only 8,239 gallons. In this instance, as in each of the other cases, the check prepared by the witness, or by Lallithan, was for the payment based on the number of gallons shown on the invoice. This witness testified that the checks issued in payment for gasoline were made out either by the witness, or Lallithan, and were signed by Fulton.

This bookkeeper testified to a number of other transactions similar to those noted above, and the record indicates that at the

been given in payment for 10,271 gallons. The jury also testified that in each case of the giving of these checks, they were made ; either by Lafitteau or by the witness at Lafitteau's suggestion, and signed by Fulton, the claimant. She identified another invoice showing a shipment and invoice of 10,209 gallons, but that the car-loaders book showed the receipt of but 8,809 gallons, and that in this instance, Lafitteau told the witness to reduce the entry from 1,[illegible] gallons to 8,809 gallons. Another invoice identified by the witness showed a shipment, and an original receipt as shown by the car book of 10,298 gallons. The witness testified that after the original entry had been made in the car book, at the direction of Lafitteau, she changed the figures so as to indicate 8,[illegible] gallons instead of 10,298 gallons. In another instance, the invoice showed a shipment of 10,267 gallons, and the witness testified that at the direction of Lafitteau, she made the entry in the car book showing receipt of 8,267 gallons. The next item testified to by the witness was of the same character, where the invoice showed a shipment of 1[illegible],[illegible] gallons, and where the witness, at the direction of Lafitteau, made an entry in the car book showing the receipt of 8,[illegible] gallons. The next item identified by the witness was of the [illegible] character, where the invoice showed a shipment of 10,[illegible] gallons, and the car book showed the receipt of only 9,[illegible] gallons. In this instance, as in each of the other cases, the clerk prepared by the witness, or by Lafitteau, was for the payment based on the number of gallons shown on the invoice. This witness testified that the checks issued in payment for gasoline were made out either by the witness, or Lafitteau and were signed by Fulton.

This bookkeeper testified to a number of other transactions similar to those noted above, and the record indicates that at the

direction of Lallithan, the books of the claimant were made to show more than 80,000 less gallons of gasoline were received than were actually received and paid for. However, in so far as we are able to learn from the record, there is no showing whatever as to what became of this gasoline. A public accountant who examined the books, shipping bills and other documents, of the claimant, estimated that there was a total difference of 86,666 gallons between the amount of gasoline actually shown as received, and the amount shown by the books to have been actually received. Upon a computation made, based upon the average price of gasoline for a period from August 1st, 1929, to August 6th, 1930, this accountant concluded that this gasoline received but not accounted for was of the value of $7,685.54.

Several other employees of claimant testified, but none of them explained the mysterious disappearance of this gasoline, which, without doubt, was received at claimant's place of business in tanks provided therefor. The only testimony which suggests wrongdoing on the part of the decedent, is that of Albert W. Rudland, a witness offered by claimant, who testified that about the first of August, 1930, and two or three days before Lallithan's death, he had a talk with the claimant, and that after such talk, he met Lallithan, and that he then told Lallithan he had heard bad news, and that Lallithan replied: "Well, it is too bad, what is the boss going to do?", and that the witness replied that "he(meaning Fulton, the claimant) is going to call the auditors in", and that Lallithan said "Well, if he does that, then that cooks my goose".

Without evidence to support it, the trial court seems to have arrived at the conclusion that Lallithan had committed suicide shortly after the incident last mentioned, and that, therefore, he

direction of Mallithan, the books of the plaintiff were made to show more than 80,000 less gallons of gasoline were received than were actually received and paid for. However, in so far as we are able to learn from the record, there is no reason whatever as to what became of this gasoline. A careful accountant who examined the books, shipping bills and other documents, of the plaintiff, estimated that there was a total difference of 85,685 gallons between the amount of gasoline actually shown as received, and the amount shown by the books to have been actually received. Upon a computation made, based upon the average price of gasoline for a period from August 1st, 1929, to August 6th, 1930, this accountant concluded that this gasoline received but not accounted for was of the value of $7,685.54.

Several other employees of plaintiff testified, but none of them explained the mysterious disappearance of this gasoline, which, without doubt, was received at plaintiff's place of business in tanks provided therefor. The only testimony which suggests wrongdoing on the part of the defendant, is that of Albert W. Midland, a witness offered by plaintiff, who testified that about the first of August, 1930, and two or three days before Mallithan's death, he had a talk with the plaintiff, and that after such talk, he met Mallithan, and that he then told Mallithan he had heard bad news, and that Mallithan replied: "Well, it is too bad, but it is too late going to do?", and that the witness replied that "he (meaning Mallithan, the plaintiff) is going to call the auditors in", and that Mallithan said "Well, if he does that, then that cooks my goose".

Without evidence to support it, the trial court seems to have arrived at the conclusion that Mallithan had committed suicide shortly after the incident last mentioned, and that, therefore, he

was guilty. The court, thereupon, made a finding of $5,000.00 against the estate without any evidence whatever, to support such a finding.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

was guilty. The court, thereupon, made a finding of $5,000.00 against the estate without any evidence whatever, to support such a finding.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

HERRN, J. AND DENIS E. SULLIVAN, J. DISSENT.

38168

THOMAS HOIST COMPANY, a corporation,

(Plaintiff) Appellee,

v.

WILLIAM J. NEWMAN COMPANY, a Corporation, et al.,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

285 I.A. 585

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree entered in the Superior Court of Cook County based upon a bill of complaint filed by the plaintiff seeking to establish and enforce a trust. No evidence was introduced, but by agreement the case was heard by the court on the allegations contained in the bill and answer and on the exhibits attached. The decree entered by the court finds that the contract involved in this litigation created a trust of the funds derived from the Sanitary District; that the plaintiff is a cestui que trustent of said fund and entitled to be paid out of it; that the defendants had been guilty of a diversion of funds from said trust to the extent of $2,037.51, and are, therefore, personally liable to repay this to the plaintiff; that defendants have stated they will continue to divert the fund which in the future will become due the plaintiff, the total of which future threatened diversions will aggregate $4,754.19.

The decree orders that a money judgment be entered against defendants for $2,037.51 and costs, and further, that an injunction issue against defendants, commanding them to desist and refrain from diverting, using or disbursing any of the funds which the court finds in this decree should be paid to plaintiff each month out of the fund provided for in said contract which amounts to $679.17 each month, beginning December, 1934, and continuing thereafter for a period of ten months.

38188

THOMAS COUNTY COMPANY,
corporation,

(Plaintiff) Appellee,

v.

WILLIAM L. NEWMAN COMPANY,
Corporation, et al.,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

28 Ill. App.

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree entered in the Superior Court of Cook County based upon a bill of complaint filed by the plaintiff seeking to establish and enforce a trust. No evidence was introduced, but by agreement the case was heard by the court on the allegations contained in the bill and answer and on the exhibits attached. The decree entered by the court finds that the contract involved in this litigation created a trust of the funds derived from the Sanitary District; that the plaintiff is a cestui que trust of said fund and entitled to be paid out of it; that the defendants had been guilty of a diversion of funds from said trust to the extent of $2,027.81, and are, therefore, personally liable to repay this to the plaintiff; that defendants have stated they will continue to divert the fund which in the future will become due the plaintiff, the total of which future threatened diversions will amount to $4,786.19.

The decree orders that a money judgment be entered against defendants for $2,027.81 and costs, and further, that an injunction issue against defendants, commanding them to desist and refrain from diverting, using or disbursing any of the funds which the court finds in this decree should be paid to plaintiff each month out of the fund provided for in a 1917 contract which amounts to $879.17 each month, beginning December, 1924, and continuing thereafter for a period of ten months.

It is further ordered that defendants pay to plaintiff $679.17, being ten per cent of plaintiff's total claim, out of payments received by defendants from the Sanitary District, each month hereafter, beginning with the payment received by defendants in March, 1935, and continuing thereafter until the full amount of plaintiff's claim be paid.

It is admitted by the parties in interest in this litigation that the question at issue rests almost entirely on the construction of the contract between Ready Co. and Newman Co. From this contract it appears that on September 24, 1931, Newman Co. entered into a contract with the Sanitary District for the furnishing of all materials, etc. for the construction of the West Side Intercepting Sewer Contract No. 4. Newman Co. gave a performance and completion bond, with the Fidelity and Casualty Company of New York as surety.

On February 5, 1932, less than five months after the date of the contract, Newman Co. suspended work because the Sanitary District was without available funds to pay current vouchers to Newman Co. From that date, February 5, 1932, until after the date of the contract between Newman Co. and Ready Co., to-wit July 16, 1934, work was not resumed under said contract, and when it was resumed, it was by Ready Co.

It is further recited that the United States Government through its constituted agency provided funds under certain conditions in an amount necessary to pay Newman Co. the prices specified in its contract with the Sanitary District, but only for work to be done after the date of supplementary contract between Newman Co., Ready Co. and the Sanitary District. No part of such funds could be used to pay for anything in connection with work done or materials furnished by Newman Co. to the time of suspension, February 5, 1932, nor for anything thereafter, except for work done and materials furnished after the resumption of the work.

It is hereby ordered that defendants pay to plaintiff $679.17, being ten per cent of plaintiff's total claim, out of payments received by defendants from the Sanitary District, each month hereafter, beginning with the payment received by defendants in March, 1933, and continuing thereafter until the full amount of plaintiff's claim be paid.

It is admitted by the parties in interest in this litigation that the question at issue rests almost entirely on the construction of the contract between Ready Co. and Newman Co. From this contract it appears that on September 24, 1931, Newman Co. entered into a contract with the Sanitary District for the furnishing of all materials, etc. for the construction of the East Side Intercepting Sewer Contract No. 4. Newman Co. gave a performance and completion bond, with the Fidelity and Casualty Company of New York as surety.

On February 3, 1932, less than five months after the date of the contract, Newman Co. suspended work because the Sanitary District was without available funds to pay current vouchers to Newman Co. From that date, February 3, 1932, until after the date of the contract between Newman Co. and Ready Co., to-wit July 16, 1932 work was not resumed under said contract, and when it was resumed, it was by Ready Co.

It is further recited that the United States Government through its constituted agency provides funds under certain condition in an amount necessary to pay Newman Co. the prices specified in its contract with the Sanitary District, but only for work to be done after the date of supplementary contract between Newman Co., Ready Co and the Sanitary District. No part of such funds could be used to pay for anything in connection with work done or materials furnished by Newman Co. to the time of suspension, February 3, 1932, nor for anything thereafter, except for work done and materials furnished after the resumption of the work.

Due to its inability to obtain the necessary funds with which to pay the cost of labor and material to be used in the performance and completion bond, Newman Co. was unable to enter into the required supplemental contract and proceed with the work. Therefore, Newman Co. faced a cancellation of the contract and a new award.

Newman Co. in order to avoid cancellation of its contract, made an arrangement with Ready Co., with the consent of the Sanitary District, whereby it assigned to Ready Co. all its right, title and interest in and to the contract between Newman Co. and the Sanitary District, and in all the tools, plant, and equipment then on the site of the work and to all monies due and to become due to Newman Co. for work performed.

The Ready Co. then entered into a contract with the Sanitary District to complete the work provided for in the contract between Newman Co. and the Sanitary District and furnished the necessary performance and completion bond. But Ready Co. undertook this only on certain conditions, which were required for its protection, and which are set forth in the contract between Newman Co. and Ready Co.

These conditions were, in substance, that all monies due at the time the contract was entered into and to become due thereafter, should, when and as paid, be deposited in a special account to be opened in such bank as Ready Co. should designate, and that no money should be drawn from said account except on checks or orders signed by Michael Ready, president of Ready Co. or by such persons as he might designate; that the money so deposited should be used to pay for labor, material or other items arising under and out of said contract with the Sanitary District and other payments thereafter set forth in said contract, except that after all the things called for by said contract had been completed and accepted

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These conditions were, in substance, that all monies due at the time the contract was entered into or becoming due thereafter, should, when and as paid, be deposited in a special account to be opened in such bank as Ready Co. should designate, and that no money should be drawn from such account except on checks or orders signed by Michael Ready, President of Ready Co. or by such persons as he might designate; that the money so deposited should be used to pay for labor, material or other items arising under and out of said contract with the Sanitary District and other payments thereafter set forth in said contract, except that after all the things called for by said contract had been completed and accepted

by the Sanitary District, and all labor, material and other items arising under and out of said contract had been fully paid, Ready Co. should receive $75,000 as full compensation for its undertakings and obligations and the balance should be paid to Newman Co. or to Newman, personally, or to such other persons, firms, etc., as Newman might designate.

According to the allegations of the bill of complaint admitted in the answers by the defendants, plaintiff entered into a contract with Newman Co. on December 15, 1931, about one and one-half months before Newman Co. suspended work. Under this contract Thomas Elevator Co. furnished labor and material to a total price of $3,591.66 and assigned this claim to plaintiff. On January 8, 1932, plaintiff sold Newman Co. one used hoist for $3,200, payable within thirty days, which sale was made by a conditional sales contract, and no part of this money has been paid, by the Newman Co.

On December 2, 1932, April 1, 1933, August 1, 1933, and December 1, 1933, and April 2, 1934, the Thomas Elevator Co. served on the Sanitary District a notice of claim for sub-contractor's lien.

As to the following evidence there is some conflict: It is alleged in the bill of complaint that on June 28, 1934, Newman Co. through its president represented to plaintiff and to Thomas Elevator Co. that it, Newman Co., was unable to complete its contract with the Sanitary District and wished to assign its interest therein to Ready Co., and that said assignment could be made only with the consent of the Sanitary District, which would withhold such consent unless all claims for mechanic's liens against said contract were released, and if Thomas Elevator Co. would release its claims, Newman Co. would make it one of the terms of its assignment to Ready Co. that plaintiff and Thomas Elevator Co. be paid the full amount of their claims out of the proceeds of said contract.

by the Sanitary District, and in fact, materials and other items arising under and out of said contract, the same fully paid, Ready Co. should receive $75,000 as full compensation for its undertakings and obligations and to whom same should be paid to Newman Co. or to Newman, personally, or to such other persons, firms, etc. as Newman might designate.

According to the allegations of the bill of complaint admitted in the answers by the defendants, plaintiff entered into a contract with Newman Co. on December 15, 1921, about one and one-half months before Newman Co. assumed work. Under this contract Thomas Elevator Co. furnished labor and material to a total price of $3,831.00 and assigned here claim to plaintiff. On January 8, 1922, plaintiff sold Newman Co. one cash bulet for $3,500, payable within thirty days, which sale was made by a conditional sales contract, and no part of this money has been paid by the Newman Co.

On December 2, 1922, April 1, 1923, August 1, 1923, and December 1, 1923, and April 1, 1924, the Thomas Elevator Co. served on the Sanitary District - notice of claim for sub-contractor's lien.

As to the following evidence there is some conflict: It is alleged in the bill of complaint that on June 28, 1924, Newman Co. through its president represented to plaintiff and to Thomas Elevator Co. that it, Newman Co., was unable to complete its contract with the Sanitary District and wished to assign its interest therein to Ready Co., and that said assignment could be made only with the consent of the Sanitary District, which would withhold such consent unless all claims for mechanic's liens against said contract were released, and if Thomas Elevator Co. would release its claims, Newman Co. would make it one of the terms of its assignment to Ready Co. that plaintiff and Thomas Elevator Co. be paid the full amount of their claims out of the proceeds of said contract.

The plaintiff further alleges that Thomas Elevator Co. believing and relying upon said representations, on June 28, 1934, executed and delivered the release to Newman Co. for use in securing the consent of the Sanitary District to an assignment of Newman Co. contract to Ready Co., which would bind Ready Co. to pay both claims out of the proceeds of said contract and receive the assurance of Newman Co., through its president, that the release would only be so used and that he Newman, would procure a written acknowledgment from Ready Co. of its liability to plaintiff and Thomas Elevator Co.

By the answer of the three defendants they admit that Thomas Elevator Co. executed the release and delivered it to Newman Co., but deny that it was given or used in securing the consent of the Sanitary District to the assignment of Newman Co. contract to Ready Co. and state that the release was obtained for the purpose of getting Ready Co. to accept said assignment.

By the answer of Ready Co. and Ready, personally, it is stated that they had no knowledge of what Newman Co., or any of its agents, stated to plaintiff in this behalf and these two defendants state they never agreed at any time that they or either of them, would bind either Ready Co. or Ready to the payment of plaintiff's claims. It is further stated that Ready Co. agreed to make payments on said claims only out of such part of the proceeds of said contract as would remain after Ready Co. had been reimbursed for any and all advances and for $75,000 in addition and that the rights of Ready Co. should be prior to plaintiff's rights and that Ready Co. should have the first and superior right to all the monies, warrants, or other evidences of indebtedness given under said contract to reimburse Ready Co. for any and all advances and for $75,000 in addition.

Newman Co., one of the defendants, denies that through its president, or any one else, it was stated that the release would

The plaintiff further alleges that Thomas Elevator Co. believing and relying upon said representations, on June 25, 1924, executed and delivered the release to Newman Co. for use in securing the consent of the County District to an assignment of Newman Co. contract to Ready Co., which said claim Ready Co. by both claims out of the proceeds of said contract and receive the assurance of Newman Co., through its president, that the release would only be so used and that the Lawyer, would procure a written acknowledgment from Ready Co. of its liability to plaintiff and Thomas Elevator Co.

By the answer of the three defendants they admit that Thomas Elevator Co. executed the release and delivered it to Newman Co., but deny that it was given or used in securing the consent of the County District to the assignment of Newman Co. contract to Ready Co. and state that the release was obtained for the purpose of getting Ready Co. to consent said assignment.

By the answer of Ready Co. and Ready, separately, it is stated that they had no knowledge of what Newman Co., or any of its agents, stated to plaintiff in this behalf and these two defendants state they never agreed at any time that they or either of them would bind either Ready Co. or Ready by the payment of plaintiff's claims. It is further stated that Ready Co. agreed to make payments on said claims only out of such part of the proceeds of said contract as would remain after Ready Co. had been reimbursed for any and all advances and for 75,000 in addition and that the rights of Ready Co. should be prior to plaintiff's rights and that Ready Co. should have the first and superior right to all the monies, warrants, or other evidences of indebtedness given under said contract to reimburse Ready Co. for any and all advances and for 75,000 in addition.

Newman Co., one of the defendants, denies that through its president, or any one else, it was stated that the release would

be used only to secure a written acknowledgment from Ready Co. of its liability to pay plaintiff or Thomas Elevator Co., and Newman Co., states that the president, Newman, showed them a copy of the contract between Newman Co. and Ready Co. and that this contract contains all the agreements and assurances made with and to plaintiff and the Thomas Elevator Co.

The contract in question is set forth in the bill of complaint, wherein it is alleged that on July 16, 1934, Newman Co. entered into a contract with Ready Co.; that in paragraph four of the contract it appears that Newman Co. agrees to obtain an agreement from plaintiff that it will extend the due date and maturity of its claim as follows: That plaintiff will agree to accept ten per cent of its claim per month, the first payment to be made ninety days after the first voucher is issued, and ten per cent thereafter until paid in full. It further appears, and it is not disputed, that the first voucher was issued in September, 1934. Consequently, it is claimed by the plaintiff that the first claim would become due in December, 1934.

The plaintiff contends that paragraph four of the contract between Newman Co. and Ready Co. determines its right to recover for the amount due, and in construing this fourth paragraph the plaintiff's position is, that when Ready Co. received its vouchers from the Sanitary District on account of the resumption of the work provided for in the contract, the plaintiff was entitled to the amount due, payable at the rate of ten per cent per month until the claim was paid in full. It would seem from this contention that plaintiff's theory is that by reason of the fact that vouchers were issued by the Sanitary District to Ready Co. for work and material furnished by it, the liability of Ready Co. is fixed and it is obliged to pay an installment each month until plaintiff is satisfied.

To properly construe this contract we must examine the

be used only to secure a written acknowledgment from Heady Co. of its liability to pay plaintiff or Thomas Elevator Co., and Newman Co., states that the president, Newman, showed them a copy of the contract between Newman Co. and Heady Co. and that this contract contains all the agreements and assurances made with and to plaintiff and the Thomas Elevator Co.

The contract in question is set forth in the bill of complaint, wherein it is alleged that on July 16, 1924, Newman Co. entered into a contract with Heady Co.; that in paragraph four of the contract it appears that Newman Co. agrees to obtain an agreement from plaintiff that it will extend the due date and maturity of its claim as follows: That plaintiff will agree to accept ten per cent of its claim per month, the first payment to be made ninety days after the first voucher is issued, and ten per cent thereafter until paid in full. It further appears, and it is not disputed, that the first voucher was issued in September, 1924. Consequently, it is claimed by the plaintiff that the first claim would become due in December, 1924.

The plaintiff contends that paragraph four of the contract between Newman Co. and Heady Co. determines its right to recover for the amount due, and in construing this fourth paragraph the plaintiff's position is, that when Heady Co. received its vouchers from the Sanitary District on account of the reconstruction of the work provided for in the contract, the plaintiff was entitled to the amount due, payable at the rate of ten per cent per month until the claim was paid in full. It would seem from this contention that plaintiff's theory is that by reason of the fact that vouchers were issued by the Sanitary District to Heady Co. for work and material furnished by it, the liability of Heady Co. is fixed and it is obliged to pay an installment each month until plaintiff is satisfied.

To properly construe this contract we must examine the

terms of the paragraph on which the plaintiff relies, and, in doing so, we find at the end of paragraph four this significant statement:

> "It being understood, however, that in no event shall Ready Co. become personally liable therefor, or for any part thereof."

Applying this language it would be but reasonable to assume that it was the intention of the parties that these claims mentioned in paragraph four were to be satisfied from the money received from the Sanitary District, and that it never was intended, from the terms of the contract, that Ready or Ready Co. should assume a personal liability for the payment of the claims against Newman Co. by furnishing means for the performance of the Sanitary District contract.

There is evidence that vouchers were received, but in what amounts, the record is not clear. The record does disclose that Ready Co., after it resumed work under this contract, expended $150,000.

In answer to plaintiff's contention, the defendants say that construing the contract as a whole, it was the intention of the parties that Ready Co. was to be reimbursed for monies expended by it in doing the work, and in addition was to receive $75,000 out of the proceeds of the Sanitary District contract before it was obliged to use the balance, if any, in the reduction of the claims of the plaintiff. In support of this contention the defendant points to paragraph eight of the contract, which is in part as follows:

> "And the parties hereto agree that the fact that certain agreements have been made as to specific creditors, aforementioned, shall not be in any way construed to mean that Ready Co., in any way, admits that they are creditors, nor that they have any right in whatever monies, warrants or evidences of indebtedness may be paid or given as payment

terms of the paragraph on which the plaintiff relies, and, in doing so, we find at the end of paragraph four this significant statement:

> "It being understood, however, that in no event shall Ready Co. become personally liable therefor, or for any part thereof."

Applying this language it would be but reasonable to assume that it was the intention of the parties to these claims mentioned in paragraph four were to be satisfied from the money received from the Sanitary District, and that it never was intended, from the terms of the contract, that Ready or Ready Co. should assume a personal liability for the payment of the claims against Newman Co. by furnishing means for the performance of the Sanitary District contract.

There is evidence that vouchers were received, but in what amounts, the record is not clear. The record does disclose that Ready Co., after it resumed work under this contract, expended $180,000.

In answer to plaintiff's contention, the defendants say that construing the contract as a whole, it was the intention of the parties that Ready Co. was to be reimbursed for monies expended by it in doing the work, and in addition was to receive $75,000 out of the proceeds of the Sanitary District contract before it was obliged to use the balance, if any, in the reduction of the claims of the plaintiff. In support of this contention the defendants points to paragraph eight of the contract, which is in part as follows:

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> under the contfact between Newman Co. and Sanitary District, prior to the rights of Ready Co. It is understood and agreed, between the parties hereto, that Ready Co. shall have the first and superior right, to all the monies, warrants, or other evidences of indebtedness, given under said contract between Newman Co. and Sanitary District, to reimburse it for any and all advances and for the $75,000 agreed to be paid as aforesaid."

Plaintiff's reply is that this provision of the contract applies only to paragraph eight, wherein certain specific claims are mentioned, and the rights of these several claimants are restricted so that Ready Co. might be paid out of the proceeds of the contract for its claim for services rendered, as specifically mentioned in the contract.

It is upon the same theory that paragraph four is called to the attention of the court as being a complete paragraph, and that under its terms plaintiff is entitled to recover the amount due from Ready Co. or Ready personally, provided payments are made, and that receipt of these payments obligates Ready Co. to settle this claim.

It is to be observed in examining the various provisions of this contract that it was the evident intention that Ready Co. was to be compensated for the work performed and material furnished, out of receipts of the Sanitary District, before the several claims designated in the contract were to be satisfied. It is further borne out by the provisions of the contract that Ready Co. was not to assume a personal obligation to pay any of these claims. This is further emphasized by paragraph eight, heretofore mentioned, in which it is stated in clear language that Ready Co. has the first and superior right to all the monies, warrants, or other evidences of indebtedness, given under said contract between Newman Co. and the Sanitary District to reimburse it for any and all advances made by this defendant, and for $75,000, as an additional sum.

It is a well known rule of law that a contract must be

under the contract [illegible] Sanitary District, prior to the rights of Ready Co. It is understood and agreed, between the parties hereto, that Ready Co. shall have the first and superior right, to all the monies, warrants, or other evidences, or indebtedness, given under said contract between [illegible] and Sanitary District, to reimburse it for any and all expenses on for the $75,000 agreed to be paid as aforesaid."

Plaintiff's reply is that this provision of the contract applies only to paragraph eight, wherein certain specific claims are mentioned, and the rights of these several claimants are restricted so that Ready Co. might be paid out of the proceeds of the contract for its claim for services rendered, as specifically mentioned in the contract.

It is upon the same theory that paragraph four is called to the attention of the court as being a complete [illegible], and that under its terms plaintiff is entitled to recover the amount due from Ready Co. or Ready personally, provided payments are made, and the receipt of these payments obligates Ready Co. to settle this claim.

It is to be observed in examining the various provisions of this contract that it was the evident intention of Ready Co. was to be compensated for the work performed and materials furnished, out of receipts of the Sanitary District, before the [illegible] claims designated in the contract were to be satisfied. [illegible] further borne out by the provisions of the contract [illegible] not to assume a personal obligation to any [illegible]. This is further emphasized by paragraph eight, [illegible], in which it is stated in clear language that Ready Co. [illegible] first and superior right to all the monies, warrants, or other evidences of indebtedness, given under said contract between [illegible] and the Sanitary District to reimburse it for any and all expenses made by this defendant, and for $75,000, as aforesaid.

It is a well known rule of law [illegible] contract must be

construed from the four corners of the instrument and the purposes of the contracting parties determined from the whole of the contract, taking into consideration the thing to be accomplished and the manner of accomplishing the purposes provided for in the contract and the payments to be made and how to be applied. When the work was resumed by Ready Co. under the contract, it was to be paid the amount due it as the work progressed. The plaintiff, however, was to receive its 10% installment payments provided for by the contract, from the balance of the fund remaining in the account of Ready Co. after the deductions, as above stated. The $75,000 mentioned in the contract was to be retained by Ready Co. only upon the completion of its contract, if the fund proved to be sufficient to satisfy this amount.

For the reasons stated in this opinion, the decree of the Superior Court is reversed and the cause is remanded with directions to that court to proceed in conformity with the views herein expressed.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

construed from the four corners of the instrument and the purposes of the contracting parties determined from the whole of the contract, taking into consideration the thing to be accomplished and the manner of accomplishing the purposes provided for in the contract and the payments to be made and how to be applied. When the work was resumed by Ready Co. under the contract, it was to be paid the amount due it as the work progressed. The plaintiff, however, was to receive its 10% installment payments provided for by the contract from the balance of the fund remaining in the account of Ready Co. after the deductions, as above stated. The $75,000 mentioned in the contract was to be retained by Ready Co. only upon the completion of its contract, if the fund proved to be sufficient to satisfy this amount.

For the reasons stated in this opinion, the decree of the Superior Court is reversed and the cause is remanded with directions to that court to proceed in conformity with the views herein expressed.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

38222

In the Matter of THE ESTATE OF JAMES THOMAS KELLY, Deceased,

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

NICHOLAS RADIS,

Plaintiff in Error.

ERROR TO

PROBATE COURT

COOK COUNTY.

285 I.A. 585

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This writ of error directed to the Probate Court of Cook County was issued upon the request of Nicholas Radis for the purpose of reviewing the record in a contempt proceeding, wherein this respondent, together with others, was found guilty in the Probate Court of Cook County and committed to the County Jail for a period of one year, unless sooner discharged in due course of law.

This proceeding was instituted upon a petition filed in the Probate Court by Jack Rubens, an investigator for the Public Administrator of Cook County. The petition sets forth that a direct contempt had been committed by reason of the fact that the document purporting to be the Last Will and Testament of James Thomas Kelly, deceased, was a forgery, and known to all of the respondents connected therewith to be such. The petitioner further named the persons involved in the matter and prayed that the Court might require the persons named to show cause why they should not be held in contempt of the Probate Court of Cook County, Illinois.

Upon the filing of this petition, the court proceeded in a summary manner, and heard the evidence of witnesses, who were interrogated, together with persons whose names appeared on the document as attesting witnesses, and one of the respondents, Julius B. Waitches, who as the attorney, filed with the clerk of the court the

38239

In the matter of [illegible] JAMES THOMAS [illegible], Deceased.	
PEOPLE OF THE STATE OF [illegible], Respondent in error, v. NICHOLAS [illegible], Plaintiff in error.	38239 I.A. 385

Mr. Justice [illegible]

This writ of error [illegible] of [illegible] County was issued upon the [illegible] of reviewing the record in [illegible] respondent, together with [illegible] Court of Cook County [illegible] of one year, unless sooner [illegible]

This proceeding was instituted [illegible] the Probate Court by [illegible] Administrator of Cook County. [illegible] contempt had been committed [illegible] purporting to be the last [illegible] deceased, was a forgery, and [illegible] connected therewith to be [illegible] persons involved in the matter [illegible] require the persons named [illegible] in contempt of the [illegible]

Upon the filing of [illegible] a summary manner, and [illegible] interrogated, together with [illegible] ment as attorneys without [illegible] Watches, who as the attorney, filed with [illegible] the court the

purported Last Will and Testament of James Thomas Kelly, deceased, also presented the petition for proof of the Will and Letters Testamentary in the Estate of James Thomas Kelly, also known as James T. Kelly and as Thomas Kelly, deceased, on February 26, A. D. 1935, praying that the will be admitted to probate and that letters testamentary be issued ~~to them~~ after proper hearing and proof, and that the petition be set down for hearing on May 16, A. D. 1935.

At the conclusion of the hearing upon the matter of contempt, the court entered an order from which it appears that James Thomas Kelly departed this life on or about the 26th day of February, 1935; that Julius P. Waitches appeared in the Probate Court of Cook County, Illinois, on the 6th day of March, 1935, and presented a document purporting by its terms to be the Last Will and Testament of James Thomas Kelly, deceased, which purported Last Will and Testament bore the signature of Paul P. Zalinck and John Dailyde as witnesses thereto, and which said purported Last Will and Testament named Bella Butman and this respondent as executors thereof; that at the time Julius P. Waitches filed the purported Last Will and Testament of James Thomas Kelly, deceased, he also presented to the court the verified petitions of Bella Butman and this respondent, the persons named in the Will as executors thereof, asking that the Will be admitted to probate and record and that Letters Testamentary issue to them in the premises.

The Court thereupon found from the evidence heard in said cause that the document said to be the Will of James Thomas Kelly, deceased, and which was presented to this court as such, and which bore the signatures of Paul P. Zalinck and John Dailyde as witnesses to the execution thereof, was not actually witnessed by these persons in the presence of James Thomas Kelly and in the presence of each

purported last Will and Testament of James Thomas Kelly, deceased, also presented the petition for probate of the Will and letters Testamentary in the Estate of James Thomas Kelly, also known as James T. Kelly and as Thomas Kelly, deceased, on February 28, A. D. 1938, praying that the Will be admitted to probate and that letters testamentary be issued xxxxxxx after proper hearing and proof, and that the petition be set down for hearing on May 16, A. D. 1938.

At the conclusion of the hearing on the petition of contempt, the court entered an order from which it appears that James Thomas Kelly departed this life on or about the 26th day of February, 1938; that Julius P. Matchen appeared in the Probate Court of Cook County, Illinois, on the 6th day of March, 1938, and presented a document purporting by its terms to be the last Will and Testament of James Thomas Kelly, deceased, which purported last Will and Testament bore the signature of Paul P. Salmon and John Dailyde as witnesses thereto, and which said purported last Will and Testament named Bella Butman and this respondent as executors thereof that at the time Julius P. Matchen filed the purported last Will and Testament of James Thomas Kelly, deceased, he also presented to the court the verified petitions of Bella Butman and this respondent, the persons named in the Will as executors thereof, asking that the Will be admitted to probate and that letters Testamentary issue to them in the premises.

The Court thereupon found from the evidence heard in said cause that the document said to be the Will of James Thomas Kelly, deceased, and which was presented to this court on March, and which bore the signatures of Paul P. Salmon and John Dailyde as witnesses to the execution thereof, was not actually witnessed by these persons in the presence of James Thomas Kelly and in the presence of each

other, as required by statute, but on the contrary the court found the fact to be that Paul P. Zalinck and John Dailyde affixed their signatures thereto after the death of James Thomas Kelly, the said John Dailyde having signed said document in the undertaking establishment maintained in the City of Chicago by the respondent, John J. Bagdonas, and the said Paul P. Zalinck having signed the document at his home after the death of James Thomas Kelly at the request and instance of this respondent, Nicholas Radis.

And the court entered a further finding from the evidence that all of the persons named above were fully advised of these facts prior to the date when the respondent, Julius P. Waitches appeared in court and presented the Last Will and the application for its probate to the Court, and that the persons herein named were scheming to perpetrate a fraud upon the court and intended to cause the court to admit to probate and record a document which the named respondents knew on said date was not the valid Last Will and Testament of James Thomas Kelly, deceased.

Thereupon the court found the said respondent Nicholas Radis, together with the other respondents, in contempt of court, and they and each of them were sentenced to the County Jail of Cook County for a period of one year from the date of the order.

The respondent Nicholas Radis makes the point that the Probate Court of Cook County erred in not discharging the respondent on his sworn testimony in open court, denying his guilt. Upon an examination of the record, filed by this respondent, we are unable to find that at any time during the hearing this respondent objected to the admissibility of evidence of witnesses on the theory that he had purged himself by his testimony as a witness at the hearing before the court. So the question resolves itself into whether the hearing before the court was in the nature of a direct contempt which assailed the dignity of the court.

other, as required by statute, [illegible] the court found the fact to be that Mr. Hilton and John Daliyde affixed their signatures thereto after the death of James Thomas Kelly, the said John Daliyde having signed a false document in the underlying establishment maintained in the city of Chicago by the respondent, John J. Bagdonas, and the said Mr. Hilton having signed the document at his home after the death of James Thomas Kelly at the request and instance of this respondent, Nicholas [illegible].

And the court entered a further finding from the evidence that all of the persons named above were fully advised of these facts prior to the date when the respondent, Julius [illegible], appeared in court and presented the last will and testament for its probate to the Court, and that the persons herein named were scheming to perpetrate a fraud upon the court [illegible] tended to induce the court to admit to probate and record a document which the named respondent knew on said date was not the valid last will and testament of James Thomas Kelly, deceased.

Thereupon the court found the [illegible] Nicholas Lagodis, together with the other respondents, in contempt of court, and they and each of them were sentenced in the County Jail of Cook County for a period of one year from the date of the order.

The respondent Nicholas Lagodis [illegible] that the Probate Court of Cook County erred in not [illegible] respondent on his sworn testimony in open court, [illegible] upon an examination of the record, filed by this respondent, [illegible] to find that at any time during the trial, this respondent objected to the admissibility of evidence of witnesses on the theory that he had purged himself by his testimony as a witness at the hearing before the court. So the question resolves itself into whether the hearing before the court was in the nature of a direct contempt which assailed the dignity of the court.

The attorneys who appear as amicus curiae invite our attention to the case of The People v. Whitlow, 357 Ill. 34, wherein the court speaks of contempts committed in open court, or a contempt that is not in the presence of the court, and says:

> "Upon the commission of a contempt in open court, it is competent for the judge to proceed upon his personal knowledge of the facts and to punish the offender summarily without entering any rule against him and without hearing any evidence. * * * Misbehavior constituting a contempt committed in any place set apart for the use of any constituent part of the court, when it is in session is deemed to have been committed in the presence of the court. * * * The order adjudging a contemner guilty of contempt committed in open court must set out the facts constituting the offense with sufficient particularity and certainty to show that the court was authorized to make the order. * * * In a case where the proceeding for contempt is for acts committed, not in the presence of the court and not in furtherance of the remedy sought or in enforcement of the court's orders or decrees but to maintain its authority and to uphold the administration of justice, if the party should answer denying the alleged wrongful acts, his answer is conclusive, extrinsic evidence may not be received to impeach it, and he is entitled to his discharge."

In the case of People v. Sheridan, 349 Ill. 202, the court stated what would be considered a constituent part of the court and said that if the alleged conduct of the persons charged took place before such constituent part of the court it was therefore in the presence of the court and a direct contempt. The court further said:

> "The first contention of defendant is that the petition filed by the State's attorney was insufficient to charge him with conduct constituting contempt of court because it did not contain an allegation that the grand jury was investigating any complaint or charge of crime committed in Cook County or an allegation of the object of the questions asked defendant when he was before the grand jury. It is a sufficient answer to this contention to state that the alleged contemptuous conduct of defendant was before the grand jury, which was a constituent part of the criminal court, and his conduct was therefore in the presence of the court and if contemptuous was a direct contempt, and it was unnecessary to file a petition or make a formal charge by affidavit in order that the court might punish him for the contempt. (People v. Cochrane, 307 Ill. 126; People v. Sherwin, 334 id. 609.) Since it was not necessary or essential that the petition be filed it is unnecessary to consider whether the allegations of the petition

The attorneys who support [illegible] brought to our attention to the case of *The People* v. *Miller*, [illegible] Ill. 2d, wherein the court speaks of contempts committed in open court, or contempts that is not in the presence of the court, [illegible]:

> "Upon the commission of a contempt in open court, it is competent for the judge to proceed upon his own personal knowledge of the facts and to punish the offender summarily without entering any rule against him or without hearing any evidence. * * * Historically, constituting a contempt committed in any place not open to the public or in any constituent part of the court, when it is in session is deemed to have been committed in the presence of the court. * * * The order adjudging a contemner guilty of contempt committed in open court must set out the facts constituting the offense with sufficient particularity and certainty to show that the court was authorized to make the order. * * * In a case where the proceeding for contempt is for acts committed, not in the presence of the court and not in furtherance of the remedy sought in the enforcement of the court's orders or decrees but to maintain its authority and to uphold the administration of justice, if the party should answer denying the alleged wrongful acts, his answer is conclusive, extrinsic evidence may not be received to impeach it, nor is he entitled to his discharge."

In the case of *People* v. *Sherwin*, [illegible] Ill. 2d, the court stated what would be considered a constitutional [illegible] of the court and said that if the alleged conduct of the [illegible] had taken place before such constituent part of the court [illegible] the place in the presence of the court and [illegible] direct contempt. The court further said:

> "The first contention of defendant is that the petition filed by the State's attorney, his [illegible] charge him with conduct constituting contempt of [illegible] it did not contain an allegation that [illegible] jury was investigating any complaint or other [illegible] in Cook County or an allegation of the subject of the questions asked defendant when he was later [illegible] grand jury. It is a sufficient answer to this contention to note that the alleged contemptuous conduct of defendant [illegible] before the grand jury, which was a constituent part of the criminal court, and his conduct was therefore in the presence of the court and it constituted [illegible] direct contempt, and it was unnecessary to file a petition or make a formal charge by affidavit in order that the court might punish him for the contempt. (*People* v. *Lechner*, 307 Ill. 126; *People* v. *Sherwin*, 356 id. 329.) Since it was not necessary or essential that the petition be filed it is unnecessary to consider whether the allegations of the petition

that was filed were sufficient to charge conduct constituting contempt of court."

From the order entered by the court, we find that the respondent in this case, together with the other respondents found guilty by the court, was present in court when a document purporting to be the Last Will and Testament of James Thomas Kelly, deceased, was presented which document was not properly signed by two witnesses, and the witnesses who did sign, were not witnesses to the execution thereof in the presence of James Thomas Kelly in his lifetime, and in the presence of each other, as required by law.

From the order, the court further found that the appearance in court for the purpose of filing the purported Last Will and Testament of James Thomas Kelly, deceased, was in furtherance of a scheme on the part of the respondents named to perpetrate a fraud, and that the contemptuous conduct of this respondent, together with the other named respondents, when the will was presented in the court for purposes of probate, took place in the presence of the court, and being a direct contempt, the judge of the Probate Court acted properly in exercising his jurisdiction to pass upon the acts of the respondents.

It is evident from the record that the court was imposed upon when this alleged Last Will and Testament of James Thomas Kelly, deceased, was presented.

The only real question involved in this proceeding, so far as this particular respondent before us is concerned, is whether the order is sufficient in its finding of fact to sustain the court's position in finding this respondent guilty.

It appears from the order that Nicholas Radis was present in the Probate Court on the day in question when one of the respondents presented and filed with the clerk of the court a document purporting to be by its terms the Last Will and Testament

that was filed were sufficient to cause somebody con-
stituting document of record."

Upon the order entered by the court, [illegible] the respondent in this case, together with the other [illegible] found guilty by the court, was [illegible] in contempt [illegible] to be the last Will and Testament of [illegible] Kelly, deceased, was presented which document was not properly signed by two witnesses, and the witnesses who did sign, were not witnesses to the execution thereof in the presence of [illegible] Kelly in his lifetime, and in the presence of each other, as required by law.

From the order, the court further found that the [illegible] in court for the purpose of filing the purported last Will and Testament of James Thomas Kelly, deceased, [illegible] a subpoena on the part of the respondents [illegible] and that the contemptuous conduct of this respondent, together with the other named respondents, [illegible] the court for purposes of proceeding [illegible] the court, and being a direct contempt, [illegible] court acted properly in exercising its jurisdiction [illegible] the acts of the respondents.

It is evident from the record [illegible] upon when this alleged last Will and Testament of James Thomas Kelly, deceased, was presented.

The only real question involved in this proceeding, so far as this particular respondent [illegible], is whether the order is sufficient in its finding of fact to justify the court's position in finding this respondent guilty.

It appears from the order [illegible] in the Probate Court on the day in question when one of the respondents presented and filed with the clerk of the court a document purporting to be by its terms the last Will and Testament

of James Thomas Kelly, deceased, and presented a signed and verified petition by Bella Butman and Nicholas Radis, this respondent, who were named in the Will as executors, asking that the will be admitted to probate and record, and that Letters Testamentary issue to the petitioners named.

It is clear from the order that Nicholas Radis appeared in court and was present when the alleged Last Will and Testament was presented to the clerk of the court - a constituent part of the court - and that the same was prepared as a part of and in furtherance of a scheme and design on the part of the respondents named to perpetrate a fraud upon the court. That, in our opinion, would of itself be sufficient, from all the facts and circumstances as they appear in the record, to justify the court's order.

The question is called to our attention that this prosecution was founded upon a petition of one Jack Rubens, and was not supported by a sufficient oath or affidavit. If we turn to the case of The People v. Sheridan, 349 Ill. 202, we will find, upon a like question, this statement by the court:

> "Since it was not necessary or essential that the petition be filed it is unnecessary to consider whether the allegations of the petition that was filed were sufficient to charge conduct constituting contempt of court."

In other words, the hearing being before the court, it was competent for the judge to consider the contemptuous conduct of the respondent before the court, as well as in the clerk's office - a constituent part of the Probate Court - and punish him for direct contempt without the filing of a petition or the making of a formal charge, supported by an affidavit.

Since the question arises largely upon the order of the court, we have examined the suggestions made by this respondent, and are of the opinion that there is sufficient in the order itself to justify the court in finding this respondent guilty and in fixing the punishment.

of James Thomas Kelly, deceased, and [illegible] and verified petition by Della [illegible] and Nicholas [illegible], the respondent, who were named in the will as executors, stating that the will [illegible] to probate and record, and that [illegible] testamentary [illegible] the petitioners named.

It is clear from the order that [illegible] in court and was present when the [illegible] of [illegible] and testament was presented to the clerk of the court - a constituent part of the court - and that the same was [illegible] in furtherance of a scheme and design on the part of the respondents named to perpetrate a fraud upon the court. That, in our opinion, would of itself be sufficient, from all the facts and circumstances as they appear in the record, to justify the court's order.

The question is called to our attention that this proceeding was founded upon a petition of one [illegible], and was not supported by a sufficient oath or affidavit. In the turn to the case of The People v. Sheridan, 349 Ill. 327, we will find, upon a like question, this statement by the court:

> "Since it was not necessary or essential that the petition be filed it is unnecessary to consider whether the allegations of the petition that was filed were sufficient to charge conduct constituting contempt of court."

In other words, the hearing being before the court, it was competent for the judge to consider the contemptuous conduct of the respondent before the court, as well as in the clerk's office - a constituent part of the Probate Court - and punish him for it. [illegible] without the filing of a petition or the making of a formal charge, supported by an affidavit.

Since the question arises legally upon the order of the court, we have examined the suggestions made by this respondent, and are of the opinion that there is sufficient in the order itself to justify the court in finding this respondent guilty and in fixing

Upon an examination of the order of the court it is to be noted that the proceeding is criminal in its nature and instigated for the purpose of inflicting punishment upon the respondents for their fraudulent acts. Although it is true that the order itself is not entitled in the name of the People of the State of Illinois, still these respondents have entitled their several briefs and abstracts, which are a part of the record, People of the State of Illinois vs. the respondents here in court, so it is evident that this is a criminal proceeding and properly entitled.

The case of The People of the State of Illinois v. Securities Discount Corp., 279 Ill. App. 70, has been called to our attention, wherein this court said:

> "The draft order indicates by the number it bears and by its text that the proceeding for the contempt or contempts therein enumerated was brought in the name and by the authority of the People of the State of Illinois, and, in our opinion, it is the order of the court in this cause. Under the circumstances we think that the manner in which the draft order was entitled was simply due to inadvertence and is inconsequential."

Upon the question of proper title, the court in the case of Manning v. Securities Co., 242 Ill. 584, said:

> "As a preliminary question it is insisted that the several appeals are not properly entitled in this court. In Lester v. People, 150 Ill. 408, it was held that ordinarily whether a contempt proceeding should be entitled and prosecuted as an independent proceeding in the name of the People or carried on as a part of the civil proceedings to which it is incident is of comparatively little importance and that the practice is not uniform."

We are of the opinion that the proceeding was criminal in its nature, and that the court did not commit error in its finding that respondent was guilty of direct contempt. The order of the Probate Court is accordingly affirmed.

ORDER AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

Upon an examination of the record, this court finds it to be noted that the proceeding is criminal in [illegible] and instituted for the purpose of inflicting punishment upon the respondents for their fraudulent acts. Although it is [illegible] that a [illegible] is not entitled in the name of the [illegible] People of the State of Illinois, still these respondents have entitled [illegible] abstracts, which are a part of the record, [illegible] of Illinois vs. the respondents here in court, and [illegible] this is a criminal proceeding, was properly entitled.

The case of The People of the State of Illinois v. Security Discount Corp., 372 Ill. App. 70, has been called [illegible], wherein this court said:

> "The first order indicates by the number in [illegible] the fact that the proceeding for the contempt or contempts therein enumerated was brought in the name and by the authority of the People of the State of Illinois, and, in our opinion, it is the order of the court in this regard. Under the circumstances we think that the manner in which the first order was entitled was simply due to inadvertence and is inconsequential."

Upon the question of proper title, the court in the case of Manning v. Securities Co., 341 Ill. [illegible], [illegible]:

> "As a preliminary question it is insisted [illegible] appellees are not properly entitled in this court. In Lustig v. People, 100 Ill. 602, it was held that a civil suit, whether a contempt proceeding should be entitled [illegible] an independent proceeding in the name of the [illegible] on as a part of the civil proceeding. [illegible] is sufficient is of comparatively little importance [illegible] is not uniform."

We are of the opinion that [illegible] criminal in its nature, and that the court did not [illegible] that respondent was guilty of direct contempt. The judgment of the Probate Court is accordingly affirmed.

[illegible]

HALL, P.J., AND DENIS E. McGIVNEY, J., concur.

38266

SYLVESTER ADAMS and ROBERT BRODZINSKI, Appellees,

v.

EDWARD ZEUTSCHEL, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

43

285 I.A. 586

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal by the defendant is from a judgment for the right to possession in the plaintiffs, entered in the Municipal Court of Chicago in an action of forcible entry and detainer.

Plaintiff's action was upon a purported lease, dated November 14, 1934, for a store at 8452 Burley Avenue, Chicago, Illinois, between Louisiana Busch, the owner, as lessor, and the plaintiffs, as lessees, for a term of five years from December 1, 1934, at a rental of $75. per month for thirty-six months, $80. for twelve months and $85. for twelve months.

Possession of this property is now and has been since November 13, 1929, under lease by the owner, Louisiana Busch, at a rental of $110. per month in the defendant. This lease was for a five year period, to be renewed for a further term of five years at $115. per month upon service of a sixty day written notice of election upon this owner by the defendant of his intention to renew before the expiration of the term.

Defendant's possession continued under a further lease from the owner, which was executed, in compliance with this option contained in the expired lease, for a period of five years from December 1, 1934, at a rental of $115. per month. The owner, Louisiana Busch, has received a rental of $115. each month from the defendant from the time of the execution of this instrument.

The question in this litigation turns upon the plaintiffs' purported lease from Louisiana Busch, the owner of the premises in question.

38256

SYLVESTER ADAMS and ROBERT BROUDIENNI,

Appellees,

v.

EDWARD KUTSCHERA,

Appellant.

285 I.A. 386

MR. JUSTICE MEREDITH DELIVERED THE OPINION OF THE COURT.

This appeal by the defendant is from a judgment for the right to possession in the plaintiffs, entered in the Municipal Court of Chicago in an action of forcible entry and detainer.

Plaintiff's action was upon a purported lease, dated November 14, 1924, for a store at 8435 Ashley Avenue, Chicago, Illinois, between Louisiana Busch, the owner, as lessor, and the plaintiffs, as lessees, for a term of five years from December 1, 1924, at a rental of $75. per month for thirty-six months, $80. for twelve months and $85. for twelve months.

Possession of this property is now and has been since November 13, 1929, under lease by the owner, Louisiana Busch, at a rental of $110. per month to the defendant. This lease was for a five year period, to be renewed for a further term of five years at $115. per month upon service of a sixty day written notice of election upon this owner by the defendant of his intention to renew before the expiration of the term.

Defendant's possession continued under a further lease from the owner, which was executed, in compliance with this option contained in the expired lease, for a period of five years from December 1, 1934, at a rental of $115. per month. The owner, Louisiana Busch, has received a rental of $115. per month from the defendant from the time of the execution of this instrument.

The question in this litigation turns upon the plaintiffs' purported lease from Louisiana Busch, the owner of the premises in

The facts regarding the alleged execution and delivery of this lease are, substantially, that plaintiffs signed the lease of November 14, 1934, and delivered it to Louisiana Busch for her signature. The lease was signed by her and returned on November 17, 1934, to plaintiffs' attorney Mr. Ryan, by Montague Bratz, Mrs. Busch's brother. Mr. Bratz advised Mr. Ryan that the riders attached to the lease were not satisfactory. Thereupon Mr. Ryan prepared new riders to be attached to the lease, which lease Mrs. Busch was to sign and return to Mr. Ryan. One of the leases was returned to Mr. Bratz, and a receipt for the lease retained by Mr. Ryan was signed, and is as follows:

> "Received of Louisiana Busch lease dated November 14, 1934, covering 8452 Burley Avenue, with Syl Adams, for purpose of being held with lessors additional copy of lease and until deposit of $535 made by lessee. When possession delivered exclusively to lessee. leases are to be delivered to respective parties. If possession cannot be delivered to lessee or if lessor's title not good as expressed in lease, leases are to be held by undersigned for cancellation. This is not to be construed as acceptance of escrow by undersigned. Escrow will not be accepted until both leases delivered and cash deposit by lessee.
> (Signed) Peden, Melaniphy, Ryan & Andreas."

Subsequently, the plaintiffs' deposit of $510 made with their attorney was withdrawn by plaintiffs on December 15, 1934.

From this record it appears that no further action was taken by the parties until this suit was begun upon the lease that was delivered to Mr. Ryan.

In the consideration of the problems involved, it is necessary that the plaintiffs recover upon the strength of their right to possession, rather than upon the weakness of their adversary's right to the premises. The real question is: Have the plaintiffs an executed lease which was delivered by the owner of the property?

The troublesome proposition which confronts this court concerns the receipt. It appears that a rider was prepared by

The facts regarding the alleged execution and delivery of this lease are, substantially, that plaintiff signed the lease of November 14, 1934, and delivered it to Louisiana Bason for her signature. The lease was signed by her and returned on November 17, 1934, to plaintiff's attorney Mr. Ryan, by Louisiana Bason, Mrs. Bason's brother. Mr. Brett advised Mr. Ryan that the riders attached to the lease were not satisfactory. Thereupon Mr. Ryan prepared new riders to be attached to the lease, which lease Mrs. Bason was to sign and return to Mr. Ryan. One of the leases was returned to Mr. Brett, and a receipt for the lease retained by Mr. Ryan was signed, and is as follows:

> "Received of Louisiana Bason lease dated November 14, 1934, covering 8638 Bailey Avenue, with ~~5x1~~ riders, for purpose of being held with lessors additional copy of lease and until deposit of $50 made by lessee. When possession delivered exclusively to lessee. Lessee are to be delivered to respective parties. If possession cannot be delivered to lessee or if lessor's title not good as expressed in lease, lessee are to be held by undersigned for cancellation. This is not to be construed as acceptance of escrow by undersigned. Escrow will not be accepted until both leases delivered and cash deposit by lessee.
> (Signed) Peden, McLaughlin, Ryan & Andrews."

Subsequently, the plaintiff's deposit of $510 made with their attorney was withdrawn by plaintiffs on December 14, 1934.

From this record it appears to be another action was taken by the parties until this suit was begun upon the lease that was delivered to Mr. Ryan.

In the consideration of the problems involved, it is necessary that the plaintiffs recover upon the strength of their right to possession, rather than upon the weakness of their adversary's right to the premises. The real question is: Have the plaintiffs an executed lease which was delivered by the owner of the property?

The troublesome proposition which confronts this court concerns the receipt. It appears that a rider was prepared by

the attorney for the plaintiffs, which, as far as this record shows, was not accepted and approved by the landowner. The conditions stated in the receipt were not performed, in that the amount to be deposited under its terms was not fully deposited, but, on the contrary, the sum of $510 deposited with plaintiffs' attorney was withdrawn some time before this suit was filed. The receipt itself does not indicate a completed and delivered contract between the parties. The deposit of $525 was not made, and this is one of the conditions not performed by the plaintiffs, and further, the signed leases with the riders attached were not delivered to the respective parties, and the cash deposit as we have stated before, was not made by the lessees.

The defendant in the instant case is in possession under the terms of an extension period fixed by a lease executed by the owner, in compliance with an option exercised by the defendant. The term of this extension lease and the rentals payable are as above stated in this opinion.

The fact that the plaintiffs' contract was not fully executed and delivered, or accepted by the defendant, does not militate against the right of the defendant to retain possession. Defendant's possession is established by the lease under which he claims right to possession, and, from the record, the court erred in finding right to possession of the property in question to be in the plaintiff.

Other questions have been raised, but it will not be necessary to consider them, as we have concluded that the defendant is in possession of the property and entitled to retain possession.

For the reasons stated in this opinion, the judgment is reversed.

JUDGMENT REVERSED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

the attorney for the plaintiffs, which, as I read the record above, was not accepted and approved by the attorney. The conditions stated in the receipt were not performed, in that the amount to be deposited under its terms was not fully deposited, but, on the contrary, the sum of $250 reposited with plaintiffs' attorney was withdrawn some time before this suit was filed. The receipt itself does not indicate a completed and delivered contract between the parties. The deposit of $250 was not made, and this is one of the conditions not performed by the plaintiffs, and further, the signed leases with the riders attached were not delivered to the respective parties, and the cash deposit as we have stated before, was not made by the lessees.

The defendant in the instant case is in possession under the terms of an extension period fixed by a lease executed by the owner, in compliance with an option exercised by the defendant. The term of this extension lease and the rentals payable are as above stated in this opinion.

The fact that the plaintiffs' contract was not fully executed and delivered, or accepted by the defendant, does not militate against the right of the defendant to set in possession. Defendant's possession is established by the lease under which he claims right to possession, and, from the record, the court erred in finding right to possession of the property in question to be in the plaintiff.

Other questions have been raised, but it will not be necessary to consider them, as we have concluded that the defendant is in possession of the property and entitled to retain possession.

For the reasons stated in this opinion, the judgment is reversed.

JUDGMENT REVERSED.

HALL, P.J. AND DENNIS E. SULLIVAN, J. concur.

38292

WILEY HITCHCOCK,
(Complainant) Appellee,
v.
WINIFRED HITCHCOCK,
(Defendant) Appellant.

~~APPEAL FROM~~
CIRCUIT COURT
COOK COUNTY.

285 I.A. 586[2]

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree entered in this cause, and from an order upon an intervening petition, allowing attorney's fees.

By order of this court, there have been consolidated for hearing Cases Nos. 38292 and 38293. In No. 38293 a separate opinion of this court has been filed.

This action is based upon a bill in chancery filed by the complainant against the defendant to set aside a certain so-called trust agreement, on the ground of forgery. The cause was heard upon the bill of complaint; the answer of the defendant and amendments thereto; the counterclaim of defendant and the amendment thereto; the petition of the defendant for a permanent injunction; the amendment to the cross-bill; the affidavit of defendant for summary judgment for all expenses, and the petition of defendant to rule on all her objections, and the intervening petition of Fred Holy for attorney's fees.

The decree of the court finds: (1) that the parties are husband and wife, though living separate and apart; that complainant has been a school teacher in the Chicago Public Schools for the last fourteen years; that he bought a home in Chicago and had the title thereto taken in joint tenancy; that defendant and their son, aged 16 years, reside there now; that after the complainant paid off the incumbrance on said home he opened a joint savings account in the First National Bank of Chicago, about December, 1925; that

38292

WILEY MITCHCOCK,	
(Complainant) Appellee,	
v.	
WINIFRED MITCHCOCK,	
(Defendant) Appellant.	

MR. JUSTICE MEDEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant from a decree entered in this cause, and from an order made on an interlocutory petition, allowing attorney's fees.

By order of this court, these two causes were consolidated for hearing under Nos. 38292 and 38293. In No. 38292 a separate opinion of this court has been filed.

This action is based upon a bill in chancery filed by the complainant against the defendant to set aside a certain so-called trust agreement, on the ground of fraud. The cause was heard upon the bill of complaint; the answer of the defendant and amendments thereto; the counterclaim of defendant and the amendment thereto; the petition of the defendant for a temporary injunction; the amendment to the cross-bill; the affidavit of defendant for summary judgment for all expenses, and the petition of defendant to rule on all her objections, and the intervening petition of Fred Holy for attorney's fees.

The decree of the court finds: (1) that the parties are husband and wife, though living separate and apart; that complainant has been a school teacher in the Chicago public schools for the last fourteen years; that the bought a home in Chicago and had the title thereto taken in joint tenancy; that defendant and their son, aged 16 years, reside there now; that after the complainant paid off the incumbrance on said home he opened a joint savings account in the First National Bank of Chicago, about December, 1928; that

upon receiving his salary checks he was in the habit of endorsing them and turning them over to defendant to deposit in their joint savings account, to be used for family support and maintenance; that said sums of money were never intended as gifts from complainant to defendant upon complainant's endorsement of said checks; that only in case of the death of complainant was defendant to become the owner of whatever sums of money remained in said savings account; that up to June 25, 1932, said savings account had reached the sum of $11,000, but should have been $15,199, instead of only $11,000, owing to the fact that defendant had deposited the total sum of $4,199, in her own name, instead of the joint account, unknown to complainant; that on June 25th, owing to a run on the bank, said parties withdrew the sum of $11,000 out of said bank and on June 26th deposited the same in a safety deposit box with the Foreman Safety Box Company vaults; that both parties have keys to said safety deposit box, but were not to draw out any money except in the presence of each other; that said sum of $11,000 is now on deposit in said safety deposit box.

(2) That the next day after said sum was so deposited, the defendant drew up a so-called trust agreement in her own handwriting, the same consisting of two sheets of paper, the part containing the alleged signature of the parties having been lost by her son, Aaron, whether purposely or not the Court being unable to decide; the Court finds that said defendant either forged the signature of complainant to said document, or wrote the second sheet of the alleged trust agreement over the genuine signature of complainant, and all unknown to complainant and without his knowledge, consent or authority; that in fact and contemplation of law there is not now nor never has there been a legal trust existing between the parties respecting said sum of $11,000; that the alleged trust fails for the further reason that there was no trustee either

upon receiving his salary checks he [illegible] right to endorsing them and turning them over to defendant [illegible] in a joint savings account, to be used for family [illegible] expenses; that said sums of money [illegible] complainant to defendant upon complainant's demand [illegible] cases; that only in case of the death of complainant [illegible] to become the owner of whatever sums [illegible] in said savings account; that up to June 25, 1942, said savings account [illegible] the sum of $11,000, but subsequently [illegible] $11,000, owing to the fact that [illegible] total sum of $4,120, in her own name, [illegible] account, unknown to complainant; that on [illegible] bank, said parties withdrew the sum of $1,000 [illegible] and on June 26th deposited the same [illegible] the Foremen Safety Box Company [illegible] to said safety deposit box, but were not to [illegible] except in the presence of each other; that [illegible] now on deposit in said safety deposit box.

(2) That the next day after [illegible] the defendant drew up a so-called trust [illegible] handwriting, the same containing [illegible] containing the alleged sign [illegible] by her son, Aaron, whether [illegible] to decide; the Court finds [illegible] signature of complainant to it [illegible] of the alleged trust agreement over the [illegible] of complainant, and all unknown to complainant [illegible] consent or authority; that in fact the [illegible] is not now nor never has been a legal trust existing between the parties respecting said sum of $11,000; [illegible] that the alleged trust fails for the further reason that there was no trustee either

mentioned or appointed, nor the said trust fund transferred to a trustee, and that the parties themselves still have control and possession of said $11,000.

(3) Finds that about August 7, 1933, complainant brought a divorce suit against defendant, alleging extreme and repeated cruelty; that for the purpose only of determining the amount of alimony complainant should pay, the properties of the parties were inquired into, including the $11,000 involved in the present suit; that there was a cross-bill filed in said suit; that a few days before the case was set for trial, complainant's then counsel withdrew from the case; that complainant then secured the services of John E. Groves, counsel in this case, who upon learning from complainant in the divorce suit that he had no one but himself to prove the charge of cruelty, advised that the divorce suit be dismissed at complainant's costs for want of equity and without trial upon the merits, which was accordingly done; that no testimony was offered or heard upon the merits and no decree of divorce was granted to either party to said suit; that no property rights were settled and under the law and the Statutes of Illinois no property rights could be settled in that case without a decree of divorce being entered, and that the status quo of the parties remained the same as if no divorce proceedings were instituted; finds that said divorce proceedings and all the orders entered therein are not res adjudicata of any of the matters and things in the present cause; that said cause was General Number B-273874 in this Court.

(4) Finds, orders and decrees in regard to the counterclaims of defendant, especially those relating to the hiring of various stenographers, attorney's fees in the divorce case, and doctor's bills caused by her own negligence in trying to evade service of summons in the present case, are not only unnecessary expenses, but also not proper charges against the complainant in

mentioned or [illegible] stated, nor [illegible] conveyed to a trustee, and that the [illegible] themselves still have control and possession of said [illegible].

(3) Finds that [illegible] court [illegible], 1950, could [illegible] brought a divorce suit against defendant, [illegible] actions [illegible] vexatious cruelty; that for the purpose of [illegible] the amount of alimony complainant should pay, the properties of the parties were inquired into, including the $[illegible],000 involved in the present suit; that there was a cross-bill filed in said suit; [illegible] before the case was set for trial, complainant's [illegible] withdrew from the case; that complainant then secured [illegible] John E. Groves, counsel in this case, who [illegible] complainant in the divorce suit that [illegible] Virgil to drop the charge of cruelty, advised that the divorce suit [illegible] at complainant's costs [illegible] without trial upon the merits, which was accordingly done; that no testimony was offered or heard upon the merits and no decree of divorce was granted to either party to said suit; that no property rights were settled and under the law and the statutes of Illinois no property rights could be settled in the case without a decree of divorce being entered, and that the status and [illegible] remained the same as if no divorce proceedings were instituted; that the said divorce proceedings and all the orders entered [illegible] of any of the matters and things in the [illegible] said cause was General Number [illegible] in said court.

(4) Finds, after and [illegible] the counter-claims of defendant, especially those relating to the [illegible] various stenographers, attorney's fees in the divorce [illegible], and doctor's bills caused by her own negligence in trying to [illegible] service of summons in the present case, are not only unnecessary expenses, but also not proper charges against the complainant in

this case; that all of the counterclaims put together are more than offset by the $4,199. of complainant's earnings which defendant has appropriated to her own use and which she failed to deposit in the said joint savings account; that all of the unpaid bills incurred by defendant be paid out of the part of the $11,000 hereinafter set aside as belonging to said defendant.

(5) Orders, adjudges and decrees that the $11,000 now in the Foreman Safety Deposit Box Company be equally divided between the parties hereto, $4,500 to each of said parties; that said safety deposit box company be ordered to allow complainant to open said safety box, and in the presence of defendant, and any of the officers of said company, draw out of said box the sum of $5,500, and leave the balance to be drawn out by defendant.

The court, having heard the testimony of Fred Holy, the intervening petitioner, also finds that he rendered legal services to the defendant, and that such services are reasonably valued at $100; and the court ordered, adjudged and decreed that Winifred Hitchcock pay to Fred Holy $100. within five days from the date hereof.

From the record in this case it appears that on November 2, 1933, the complainant filed an amended bill of complaint in the Circuit Court of Cook County, against the defendant, his wife, for divorce, on the ground of cruelty. From the bill it appears that the parties are the owners in joint tenancy of the premises located at 3307 West 65th Place, Chicago, and, among other things, that the complainant has been in receipt of a substantial income for several years last past, and maintained a savings account no. 668028 in The First National Bank; that all monies deposited in said account were monies earned by complainant and monies which were the sole and separate property of the complainant; that for convenience the account was maintained in the names of Wiley and Winifred Hitchcock;

this case; that all of the counterclaims [illegible] more than offset by the $4,[illegible], of conclusively [illegible] defendant has appropriated to her own use and which [illegible] to deposit in the said joint savings account; [illegible] said [illegible] incurred by defendant be paid out of the [illegible],000 benefit after set aside as belonging to said defendant.

(3) Costs, adjudged and [illegible] the $1,000 now in the foreman safety deposit box [illegible] be equally divided between the parties hereto, $4,500 to each of said parties; that said safety deposit box company be ordered to allow complainant to open said safety box, and in the presence of [illegible], and [illegible] the officers of said company, draw out [illegible] and leave the balance to be [illegible].

The court, having [illegible] the testimony [illegible], the intervening petitioner, also rights [illegible] to be rendered legal services to the defendant, and that such services are reasonably valued at $100; and the court ordered, adjudged and decreed that initial Hitchcock pay to Fred Holy $100. Within five days from [illegible] hereof.

From the record in this case [illegible] on November 5, 1933, the complainant filed an amended bill of complaint in the Circuit Court of Cook County, against the defendant, [illegible], for divorce, on the ground of cruelty. Upon the bill it [illegible] that the parties are the owners in joint tenancy of [illegible] located at 3307 West 65th Place, Chicago, and, [illegible], that the complainant has been in receipt of [illegible] income for several years last past, and maintained a savings account in [illegible] in The First National Bank; that all moneys deposited in said account were monies earned by complainant and monies which were the sole and separate property of the complainant; that for convenience the account was maintained in the name of Wilfy and Winifred Hitchcock;

that the defendant made no contribution whatsoever toward the accumulation of the savings account; that in the latter part of June, 1932, the account was in excess of $11,000; that complainant withdrew $11,000 from said account on June 24, 1932, and deposited same in a safety deposit box in the Foreman State Safety Vault Company; that said box is held in the names of both of the parties hereto under an arrangement whereby neither has access to the box without the presence of the other; that said $11,000 is the sole and separate property of complainant, and that defendant has no interest in said sum whatsoever.

To this amended bill the defendant filed an amended answer denying in general terms that the complainant is entitled to the relief prayed for.

This cause was finally reached for trial, and before any evidence was heard by the Chancellor, he entered the following order upon the request of the complainant:

> "This cause coming on to be heard on the trial of said cause, the same having been set to be tried on the 27th day of December, 1933, and Leslie H. Whipp appearing on behalf of the defendant, and John F. Groves appearing on behalf of the complainant, and the said John E. Groves having made his written motion to dismiss said cause;
>
> It is ordered, adjudged and decreed that said cause be and the same is hereby dismissed at the complainant's costs, for want of equity.
>
> Enter: G. F. Rush,
> Judge.
>
> O.K.
> Wiley Hitchcock."

Subsequent to the dismissal of complainant's bill for divorce, he filed his bill of complaint on February 3, 1934, in the Circuit Court, and, upon the issues being joined, the court entered the decree of January 25, 1935, declaring the signature of complainant to the trust deed to be a forgery, and entered an order for solicitor's fees, based upon the intervening petition of Fred Holy. These cases, which have been consolidated, are now here on appeal by the defendant.

that the defendant made a [illegible] to recover towards the accumulation of the savings account; that [illegible] part of June, 1932, the account was in excess of [illegible]; that complainant withdrew $11,000 from said account on June [illegible], 1932, and deposited same in a safety deposit box in the Tonawanda [illegible] Safety Vault Company; that said box is held in the name of both of the parties hereto under an arrangement whereby neither has access to the box without the presence of the other; that [illegible] is the sole and separate property of complainant, and that defendant has no interest in said sum whatsoever.

To this amended bill the defendant filed an amended answer denying in general terms that the complainant is entitled to the relief prayed for.

This cause was finally reached for trial, and before any evidence was heard by the Chancellor, he entered the following order upon the request of the complainant:

> "This cause coming on to be heard on the trial of said cause, the same having been set to be tried on the 27th day of December, 1932, and Leslie H. Miles appearing on behalf of the defendant, and John E. Groves appearing on behalf of the complainant, and the said John E. Groves having made his written motion to dismiss said cause;
>
> It is ordered, adjudged and decreed that said cause be and the same is hereby dismissed at the complainant's costs, for want of equity.
>
> Enter: L. L. [illegible],
> Judge.
>
> O.K.
> Miles Hitchcock."

Subsequent to the dismissal of complainant's bill for divorce, he filed his bill of complaint on February [illegible], 1933, in the Circuit Court, and, upon the issues [illegible] above, the court entered the decree of January [illegible], 1935, declaring the assurance of complainant to the trust deed to be a forgery, and entered an order for solicitor's fees, based upon the intervening petition of Fred Holy. These cases, which have been consolidated, are now here on appeal by the defendant.

The point is made by the defendant that dismissal for want of equity of the former divorce proceeding instituted by the complainant is res adjudicata as to all questions decided or which might have been decided in that proceeding, and therefore constitutes a bar to the relief sought by the complainant in the present proceeding. The defendant cites many decisions of courts of last resort upon the question of the application of the rule of res adjudicata, the latest of which is Webb v. Gilbert, 357 Ill. 340, wherein the court said:

> "Res judicata has a fixed meaning in law. It embraces not only what was determined in the earlier proceeding but covers any and all matters which might have been presented and an adjudication thereon determined in such proceeding. (Rogers v. Higgins, 57 Ill. 244; Bennitt v. Star Mining Co., 119 id. 9; Lusk v. City of Chicago, 211 id. 183; Marie Church v. Trinity Church, 253 id. 21; Bailey v. Bailey, 115 id. 551; Godschalck v. Weber, 247 id. 269.) When there has been a final judgment or decree neither party thereto should again be permitted to relitigate by undertaking to change his position in the case and to force his adversary again to defend against the same matters and matters collateral thereto as were properly involved or might have been brought forth in the prior litigation, nor should the time of the court be taken in considering and deciding issues between the same parties involving the same subject matter where there has already been one final decision, which is still in full force and effect."

In that case the court held that the rule of res judicata was applicable in a proper case, and it is for this court to determine whether the facts in the instant case are such that the rule would apply.

The defendant also seeks to apply the rule of retraxit in this court, and quotes from the case of United States v. Parker, 120 U. S. 89, as follows:

> "A judgment of non-suit, whether rendered because of the failure of the plaintiff to appear and prosecute his action, or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is

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> "Res judicata has a fixed meaning in law. It embraces not only what was determined in the earlier proceeding but covers any and all matters which might have been presented and an adjudication thereon determined in such proceeding. (Rogers v. Murphy, 57 Ill. 244; Bennett v. Jones, 70 Ill. 79; Mack v. City of Chicago, 71 Ill. 80; Wells Church v. Trinity Church, 258 Ill. 81; Bailey v. Bailey, 115 Ill. 551; Cadenhick v. Weber, 247 Ill. 329.) When there has been a final judgment or decree neither party thereto should again be permitted to relitigate by undertaking to change his position in the case and to force his adversary again to defend against the same matters and matters collateral thereto as were properly involved or might have been brought forth in the prior litigation, nor should the time of the court be taken in considering and deciding issues between the same parties involving the same subject matter where there has already been one final decision, which is still in full force and effect."

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> "A judgment of non-suit, whether rendered because of the failure of the plaintiff to appear and prosecute his action, or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is

> not conclusive as an estoppel, because it does not determine the rights of the parties."

In that case the reason for the application of this rule is clear, for, as stated in the opinion, its applicability must be determined from the facts as they appear in the case. The court said:

> "The judgment was rendered upon the evidence offered by the defendants, which could only have been after the plaintiff had made out a prima facie case. That evidence was passed upon judically by the court, who determined its effect to be a bar to the cause of action. This was confirmed by the consent of the attorney representing the United States. The judgment of dismissal was based on the ground of the finding of the court, as matter of fact and matter of law, that the subject-matter of the suit had been so adjusted and settled by the parties that there was no cause of action then existing. This was an ascertainment judically that the defense relied upon was valid and sufficient, and consequently was a judgment upon the merits, finding the issue for the defendants."

The court before whom the divorce proceeding was pending did not hear evidence on the trial day, and therefore did not determine the effect of the evidence on the rights of the parties to the litigation. The order of dismissal was not based upon a finding by the court that the complainant was without remedy, nor does it appear that the litigation as between the parties was adjusted. We are of the opinion that res adjudicata is no bar to complainant's action now pending.

Upon the trial of the divorce case no claim was made that evidence was offered at a final hearing, or that the decree of dismissal adjudicated any of the property rights of the parties. While the $11,000 accumulated during the married life of the parties was at issue, the parties were chargeable with the obligation of the trust agreement. In this connection the complainant charged that his name had been forged to the document, and, in addition, that pages had been substituted over his alleged signature. The rule of law, which is supported by authorities, is that the complain-

not conclusive as an estoppel, because it was not determine the rights of the parties."

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ant may dismiss his bill, even after the chancellor has announced his finding, but before a decree has been entered. In the case of Williams v. Breitung, 216 Ill. 299, the court said:

> "The complainant may dismiss his bill even after the chancellor, upon the hearing has announced his conclusions. (Purdy v. Henslee, 97 Ill. 389.) * * * It makes no difference that the decree of dismissal, entered by the chancellor below, is to be regarded as a decree dismissing the bill without prejudice * * *. But 'it is not regarded as prejudicial to the defendant that the complainant dismiss his own bill, simply because the complainant may file another bill for the same matter'." (Bates v. Skidmore, 170 Ill. 233.)

The law is so well established that it needs no citation of authorities - that when the court has considered the merits and entered a final decree determining the rights of the parties, the law of res adjudicata will apply.

The defendant calls to our attention the case of Maffenbier v. Gearhart, 257 Ill. 315, as having a bearing on the question of the dismissal of a case by the court for want of equity, before a hearing and final decree. From an examination of the authority, it appears that the case had been referred to a master and evidence submitted by the defendant, even though the complainant did not appear, and when the case was heard by the chancellor on the evidence taken before the master, the chancellor dismissed the bill for want of equity. In that case the question of the application of the law of res adjudicata was material.

One of the important questions to be considered in this litigation is whether the so-called trust agreement dated June 26, 1932, was agreed to by the parties and is a valid, subsisting trust, revocable only by consent of the parties thereto. The agreement in question is in these words:

> "June 26, 1932,
>
> "The money in the Foreman-State Safety Vault Co. safety box belongs to Winifred Hitchcock and Wiley Hitchcock

ant may dismiss his bill, even after the chancellor has announced his finding, but before a decree has been entered. In the case of Williams v. Preston, 216 Ill. 299, the court said:

> "The complainant may dismiss his bill even after the chancellor, upon the hearing has announced his conclusions. (Purdy v. Hensler, 97 Ill. 329.) * * * It makes no difference in the decree of dismissal, entered by the chancellor below, is to be regarded as a decree dismissing the bill without prejudice * * *. But 'it is not regarded as prejudicial to the defendant that the complainant dismiss his own bill, simply because the complainant may file another bill for the same matter.' (Bates v. Skidmore, 170 Ill. 238.)

The law is so well established that it needs no citation of authorities - that when the court has considered the merits and entered a final decree determining the rights of the parties, the law of res adjudicata will apply.

The defendant calls to our attention the case of Kiffenbier v. Gearhart, 257 Ill. 216, as having a bearing on the question of the dismissal of a case by the court for want of equity, before a hearing and final decree. From an examination of the authority, it appears that the case had been referred to a master and evidence submitted by the defendant, even though the complainant did not appear and when the case was heard by the chancellor on the evidence taken before the master, the chancellor dismissed the bill for want of equity. In that case the question of the application of the law of res adjudicata was material.

One of the important questions to be considered in this litigation is whether the so-called trust agreement dated June 26, 1922, was agreed to by the parties and is a valid, subsisting trust, revocable only by consent of the parties thereto. The agreement in question is in these words:

"June 26, 1922.

"The money in the Foreman-State Safety Vault Co. safety box belongs to Winifred Hitchcock and Wiley Hitchcock

and cannot be touched or withdrawn without the consent, presence and signature of both. This Eleven thousand dollars in the above mentioned safety box is to be held in trust twenty years for the above mentioned persons so they won't be destitute in their old age. If we (Wiley Hitchcock and Winifred Hitchcock) decide to break this trust agreement at any time 1/2 of this Eleven Thousand dollars shall go to each of us. When the above mentioned persons decide to withdraw this Eleven Thousand dollars from the safety box, it shall be deposited in some bank chosen by them and deposited under this trust agreement.

In case either Winifred Hitchcock or Wiley Hitchcock should die this money shall go to the survivor. If both Winifred Hitchcock and Wiley Hitchcock die before their son Aaron Hitchcock this Eleven thousand dollars shall pass, without process of law to their son Aaron Hitchcock.

(Signed) Winifred Hitchcock
(SEAL) Wiley Hitchcock"

In this case the complainant testified that he did not sign the alleged agreement, and that the only time he saw this document was on or about December 9, 1933, when it was produced before Judge Rush in the divorce proceeding between the complainant and his wife. The defendant testified that the agreement was in her own handwriting and was signed in the kitchen on a small breakfast table by herself and her husband, the complainant, and that at that time no other person was present. The son Aaron also testified that he knew nothing about the preparation of the document; that he was not present when it was signed; that he knew his father's signature, and that it was attached to the portion of the document lost by the witness.

It was for the court to pass upon the credibility of the witnesses in this case and determine from the evidence the weight to be given to the testimony. While the evidence is conflicting, the court passed upon the facts as they appeared from the evidence, and in this court of appeal we will determine only from the evidence whether the decree was against the manifest weight of this evidence. If it is evident from the record and clear to the understanding that the decree is not supported by the evidence, it is then the duty of

and cannot be touched or withdrawn without the consent, presence and signature of both. This Eleven Thousand dollars in the above mentioned safety box is to be held in trust twenty years for the above mentioned persons so they won't be destitute in their old age. If we (Wiley Hitchcock and Winifred Hitchcock) decide to break this trust agreement at any time 1/2 of this Eleven Thousand dollars shall go to each of us. When the above mentioned persons decide to withdraw this Eleven Thousand dollars from the safety box, it shall be deposited in some bank chosen by them and deposited under this trust agreement.

In case either Winifred Hitchcock or Wiley Hitchcock should die this money shall go to the survivor. If both Winifred Hitchcock and Wiley Hitchcock die before their son Aaron Hitchcock this Eleven thousand dollars shall pass, without process of law to their son Aaron Hitchcock.

(SEAL) (Signed) Winifred Hitchcock
Wiley Hitchcock"

In this case the complainant testified that he did not sign the alleged agreement, and that the only time he saw this document was on or about December 3, 1938, when it was produced before Judge Nash in the divorce proceeding between the complainant and his wife. The defendant testified that the agreement was in her own handwriting and was signed in the kitchen on a small breakfast table by herself and her husband, the complainant, and that at that time no other person was present. The son Aaron also testified that he knew nothing about the preparation of the document; that he was not present when it was signed; that he knew his father's signature, and that it was attached to the portion of the document lost by the witness.

It was for the court to sift upon the credibility of the witnesses in this case and determine from the evidence the weight to be given to the testimony. While the evidence is conflicting, the court passed upon the facts as they appeared from the evidence, and in this court of appeal we will determine only from the evidence whether the decree was against the manifest weight of this evidence. If it is evident from the record and clear to the understanding that the decree is not supported by the evidence, it is then the duty of

the court to reverse it. The authorities hold that the Appellate Court will not interfere with the finding of a lower court where there is a conflict in the evidence, unless such finding is clearly against the manifest weight of the evidence. This rule has been approved in so many cases it will not be necessary to cite any of them.

The method of service of the alias summons upon the defendant is questioned on the ground of fraud. However, this question of service was considered by the chancellor, and evidence heard by him upon the alleged tactics of the officer who served the summons, as well as of the attorney for the complainant, and he decided that the summons was properly served. The chancellor having arrived at this conclusion upon the evidence as disclosed by the record, we are of the opinion that he did not err. The appearance of the defendant is in the record; therefore the court below had jurisdiction of the person and properly proceeded to pass upon the questions involved in this lawsuit.

The defendant complains that throughout the trial of this cause the conduct and remarks of the chancellor were such as to demonstrate his inability to impartially weigh and determine the issues involved, and calls the attention of the court to excerpts from the record of the remarks of the court.

A party to a litigation will not be allowed to take advantage of his own wrong, nor to complain of the remarks of the trial judge as error when such remarks were induced by his own conduct. To be allowed to do so, would cause the opponent in the case to suffer the consequences of the misconduct of another. This rule has been recognized and approved by the courts in this state.

the court to reverse it. The authorities hold that the appellate Court will not interfere with the finding of a lower court where there is a conflict in the evidence, unless such finding is clearly against the manifest weight of the evidence. This rule has been approved in so many cases it will not be necessary to cite any of them.

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The defendant complains that throughout the trial of this cause the conduct and remarks of the chancellor were such as to demonstrate his inability to impartially weigh and determine the issues involved, and calls the attention of the court to excerpts from the record of the remarks of the court.

A party to a litigation will not be allowed to take advantage of his own wrong, nor to complain of the remarks of the trial judge as error when such remarks were induced by his own conduct. To be allowed to do so, would cause the opponent in the case to suffer the consequences of the misconduct of another. This rule has been recognized and approved by the courts in this state.

Spenler v. Turley, 158 Ill. App. 146; Schikore v. Platsky, 151 Ill. App. 280; Elgin, Joliet & Eastern Ry. Co. v. Michael Lawler, 132 Ill. App. 280 - affirmed in 229 Ill. 621. While the defendant has, by excerpts from the record, called our attention to the language of the court in reprimanding her during the course of the trial, yet it would seem that the remarks may have been provoked by defendant's conduct. Her conduct has not been properly called to the Court's attention; therefore, in the absence of such evidence, the remarks could not be considered prejudicial.

In this proceeding the hearing of evidence was before a chancellor, and in passing upon the facts there is nothing in the record which would indicate that the chancellor was partial, or that the decree entered by him was erroneous.

We have examined the cases that we consider important among the many cited by the parties to this litigation, and, from our views expressed herein, are of the opinion that the court did not err in entering the decree. Therefore the decree is affirmed.

DECREE AFFIRMED.

HALL, P. J. AND DENIS E. SULLIVAN, J. CONCUR.

[illegible] v. [illegible], [illegible]
Ass. 90, [illegible]
111, [illegible] 90 - [illegible]
by examples [illegible]
of the [illegible]
it would [illegible]
[illegible]
[illegible]
[illegible]

In this [illegible]
[illegible] or [illegible],
the [illegible]
or that the [illegible]

[illegible]
[illegible] the [illegible]
our view [illegible]
did not [illegible]
[illegible]
referred.

Hill, [illegible]

38293

IN RE PETITION OF FRED HOLY, Appellee, v. WINIFRED HITCHCOCK, Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

285 I.A. 586[3]

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

In determining the issue in this case we shall consider abstracts and briefs filed by the respective parties in consolidated cases Nos. 38292 and 38293.

This proceeding is based upon the intervening petition of Fred Holy, who appeared as attorney for the defendant, Winifred Hitchcock, in the proceeding entitled Wiley Hitchcock versus Winifred Hitchcock, Case No. 38292. On a hearing of the intervening petition, the court entered a judgment for the intervener for legal services rendered his client, Winifred Hitchcock. From this judgment order the defendant appeals.

The petitioner, in his petition, on which his claim is based, states that there was no special agreement of any kind regarding his fees, but that Winifred Hitchcock had agreed to pay reasonable counsel fees, and therefore petitioner prays that the petition be set down for a trial at an early date, and that he be allowed to prove his fees for services rendered, and which he will still be called on to render for the defendant, Winifred Hitchcock, in the above cause, and offers evidence as to the value of his services rendered in the proceeding in which he appeared, and for such services he regarded the sum of $700 a reasonable fee.

It appears from the record in this case, however, that during the course of the trial in the case of Wiley Hitchcock versus Winifred Hitchcock, No. 38292, this petitioner was discharged by the defendant for reasons which were at that time stated; that his services

38292

IN RE PETITION [illegible] HOLY,

Appellee,

v.

WINIFRED HITCHCOCK,

Respondent.

Mr. JUSTICE [illegible] delivered the opinion [illegible].

In determining the issue in this case we [illegible] consider-
abstracts and briefs filed by the respective [illegible] in consolid-
dated cases Nos. 38292 and 38293.

This proceeding [illegible] the petition [illegible] petition of
Fred Holy, who appeared as attorney for the defendant, Winfred
Hitchcock, in the proceeding entitled "Holy v. Hitchcock" versus
Winifred Hitchcock, case no. 38293. [illegible] the [illegible]
ing petition, the court entered a judgment for the [illegible] for
legal services rendered his client, Winifred Hitchcock. From this
judgment order the defendant appeals.

The petitioner, in his petition, [illegible] claim is
based, states that there was no agreement [illegible] and
regarding his fees, but that Winifred Hitchcock [illegible] reasonable
reasonable counsel fees, and therefore petitioner [illegible] the
petition be set down for a trial upon [illegible] and [illegible] he
allowed to prove his fees for services rendered. [illegible] will
still be called on to render for the [illegible] Hitchcock,
in the above cause, and offers evidence [illegible] the [illegible]
services rendered in the proceeding in which [illegible] and for
such services be required the sum of [illegible].

It appears from the record in this [illegible], however, that
during the course of the trial in the case of Holy v. Hitchcock versus
Winifred Hitchcock, No. 38293, this petitioner was discharged by the
defendant for reasons which were at that time stated; that his services

were continued by the court and his withdrawal denied. It is our opinion that in this the court erred; that the defendant had the undoubted right to discharge her attorney, and if she wished to continue to act in her own behalf in the trial she had the right under the law to do so.

The statute regarding attorneys' liens, Ch. 13, Par. 13, Sec. 1, Ill. State Bar Stats. 1935, provides -

> "That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee. * * * Provided, however, such attorneys shall serve notice in writing, * * *."

It appears from the recordthat this petitioner did serve a notice in writing of his claim for a lien in the proceeding in which he appeared as the attorney. The court in the adjudication of the amount due such attorney from his client shall enter such order and enforce such lien as may have been established. The record does not show that the proceeding was for the purpose of establishing a lien for the amount claimed to be a reasonable fee, but rather a suit between attorney and client for the purpose of recovering a reasonable amount for services. We are of the opinion that it was the intention of the legislature, in passing this act, that attorneys in litigations in which they have been retained should have the right, by petition, to have the court fix the amount of their fees, and thereby establish a lien upon the claims, demands and causes of action in their hands by their clients. This did not appear to be the purpose of the claimant by his petition. Where, however, there is a dispute between attorney and client, as in the instant case, it would seem to be the proper practice for counsel to institute suit for recovery of fees earned in the litigation, so as to give the contending party an opportunity to appear and make his defense. While it appears that the evidence

were continued by the court on its withdrawal thereof. It is our opinion that in this the court erred; that the court has the undoubted right to discharge her attorney, and if she wished to continue to act in her own behalf in the trial have had the right under the law to do so.

The statute regarding attorneys' liens, [illegible], 1. 15, p. 15, Sec. 1, Ill. State Bar Stats. 1935, provides -

> "That attorneys at law shall have a lien [illegible] all claims, demands and causes of action, including all cause for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or in the absence of such agreement, for a reasonable fee. * * * provided, however, such attorneys shall serve notice in writing, * * *."

It appears from the record that this petitioner did serve a notice in writing of his claim for a lien in the proceeding in which he appeared as the attorney. The court in the judgment [illegible] the amount due such attorney from his client and [illegible] such order and enforce such lien as may have been established. The record does not show that the proceeding was for the enforcement of a lien for the amount claimed to be a reasonable fee, but rather a suit between attorney and client for the purpose of recovering a reasonable amount for service. [illegible] of the opinion that it was the intention of the legislature, in passing the act, that attorneys in litigations in which they [illegible] should have the right, by petition, to have the court fix the amount of their fees, and thereby establish a lien upon the cause of action and proceeds of action in their hands by their clients. This is [illegible] to be the purpose of the claimant by his petition. Here, however, there is a dispute between attorney and client, and in the instant case, it would seem to be the proper practice for counsel to institute suit for recovery of fees earned in the litigation, so as to give the contending party an opportunity to appear and make his defense. While it appears that the evidence

of the attorney was heard over the objection of the defendant, Winifred Hitchcock, before the court without a jury, we are of the opinion that the court should have dismissed the petition without prejudice. From the facts disclosed by the record, the petitioner can not upon his intervening petition maintain his suit filed in the litigation then pending.

For the reasons stated, the judgment entered by the court for the sum of $100, should be reversed, and under the circumstances in this case and the construction we have placed upon the Attorney's Lien Act, it will not be necessary to remand the cause for another trial. Therefore the judgment is reversed.

JUDGMENT REVERSED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

of the attorney was heard over the objection of the defendant, Winifred Hitchcock, before the court without a jury, we are of the opinion that the court should have dismissed the petition without prejudice. From the facts disclosed by the record, the petitioner can not upon his intervening petition maintain his suit filed in the litigation then pending.

For the reasons stated, the judgment entered by the court for the sum of $100, should be reversed, and under the circumstances in this case and the construction we have placed upon the Attorney's Lien Act, it will not be necessary to remand the cause for another trial. Therefore the judgment is reversed.

JUDGMENT REVERSED.

HALE, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

38315

RUTH Q. MORTELL, Administratrix of the Estate of Cyril J. Quail, Deceased,

Appellant,

v.

GUY A. RICHARDSON and WALTER J. CUMMINGS, as Receivers, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

285 I.A. 586

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff, administratrix of the Estate of Cyril J. Quail, deceased, has appealed to this court from a judgment entered by the court for the defendants upon a directed verdict, wherein the court instructed the jury to find the defendants not guilty.

This action was based upon plaintiff's declaration consisting of one count, wherein it was charged that plaintiff's intestate was crossing Clark Street from the east to the west just north of Waveland Avenue, in the City of Chicago, and that the defendants so carelessly, negligently and recklessly ran, managed and controlled a southbound street car on Clark Street as to strike and injure plaintiff's intestate, and that the injuries so sustained caused his death.

The defendants' plea in this action was one of not guilty.

The evidence of the plaintiff was heard before the court and a jury, and upon defendants' motion, the court instructed the jury, at the close of plaintiff's evidence, to return a verdict of not guilty.

The plaintiff contends that in considering defendants' motion, the court erred by reason of failure to apply the rule of law that all reasonable inferences favorable to the plaintiff must be drawn from the evidence and the circumstances surrounding the accident at the time of its occurrence, and the facts are to be accepted as true. Walldren Express Co. v. Krug, 291 Ill. 472; Yess v. Yess, 255 Ill. 414; Hunter v. Troup, 315 Ill. 293.

38318

HUGH A. [illegible], administrator, of the Estate of April 4, [illegible], deceased,	[illegible] and [illegible]
Appellant,	
v.	[illegible] COURT
GUY A. RICHARDSON and [illegible] A. [illegible], as receivers, et al.,	[illegible]
Appellees.	

Mr. JUSTICE [illegible] DELIVERED THE [illegible].

The plaintiff, administratrix of the estate of April 4, [illegible], deceased, has appealed to this court from a judgment entered by the court for the defendants upon a directed verdict, wherein the court instructed the jury to find the [illegible] not guilty.

This action [illegible] consolidated [illegible] action consisting of one count, wherein it [illegible] plaintiff's intestate was crossing [illegible] street from the east to the west just north of Roseland Avenue, in the City of [illegible], when the defendants so carelessly, negligently and [illegible] managed and controlled a motor vehicle [illegible] so as to strike and injure plaintiff's intestate, [illegible] which caused his death.

The defendants [illegible] not guilty.

The evidence of the plaintiff [illegible] court and a jury, and upon defendants' motion, [illegible] the jury, at the close of plaintiff's evidence, [illegible] not guilty.

The plaintiff [illegible] motion, the court [illegible] law that all reasonable and [illegible] be drawn from the evidence and the [illegible] accident at the time of its occurrence, [illegible] accepted as true. [illegible] v. [illegible], 291 Ill. 477; Yeas

The facts before the trial court were that the plaintiff's intestate Cyril J. Quail, on the night of February 28, 1932, was employed by the City of Chicago as a fireman. At the time of his death he was a widower living with and supporting five children. On the night in question he was walking west on the north sidewalk of Waveland Avenue in the City of Chicago, with the intention of boarding a southbound Clark Street car operated by the defendants at this point. When plaintiff's intestate was about 8 or 9 feet from the east curb of Clark Street a southbound street car was seen approaching 125 to 150 feet north of Waveland Avenue, at the rate of 35 miles an hour. At this moment Quail started to run across the street on the north crosswalk directly west, when he raised his right hand to signal the motorman. There is evidence that the motorman threw off the switch and applied the brakes, which slackened the speed of the car. Before the car reached Waveland Avenue the speed was increased, without the ringing of the gong on the car. Quail ran on and as he did so he reached the center track, where he was struck by the left front of the street car. The car passed over the crossing, and the rear end of it was beyond the south line of Waveland Avenue when it stopped.

The injuries sustained by Quail in this accident caused his death. The street car operated on this occasion was a front-entrance-for-passengers car with the conductor located in the center of the car. The headlight on the car was burning, as well as the lights in the interior of the car. There is evidence that on the night in question the intersection was lighted. As this car approached this intersection from the north, the motorman could be seen in the car 75 feet north of Waveland Avenue, and at that point the car was running at a speed of approximately 35 miles an hour, when the motorman made a motion as if to control the speed of the car.

The facts before the [illegible] interest to Cyril J. [illegible], on the [illegible], was employed by the City of [illegible]. [illegible] death he was a widower living with one [illegible] Lucas [illegible]. On the night in question he was [illegible] on the [illegible] Cleveland Avenue in the City of Lakewood. [illegible] boarding a southbound [illegible] at this point. [illegible] from the east curb [illegible] approaching 100 to 150 feet north [illegible] 35 miles an hour. [illegible] street on the north crosswalk [illegible] hand to signal the motorman. There is evidence that the motorman threw off the switch and applied the [illegible] speed of the car. Before the car [illegible] was increased, without the [illegible] ran on and as he did so proceed the [illegible] struck by the left front of the car [illegible] crossing, and the rear end of [illegible] Avenue when it stopped.

The injuries [illegible] his death. The street car [illegible] front-entrance-for-passengers car [illegible] of the car. The headlight on the [illegible] lights in the interior of the car. [illegible] night in question the intersection [illegible] was this intersection from the north, [illegible] car 75 feet north of Cleveland Avenue, [illegible] was running at a speed of approximately 35 miles an hour, when the motorman made a motion as if to control the speed of the car.

The authorities all agree that the attempt of the plaintiff to pass in front of the moving street car was not of itself alone contributory negligence. The question is: Did Quail, as a reasonably prudent man under like circumstances, in attempting to pass the front of this car as it was approaching, put himself in a position of peril?

In the determination of the case we must consider the question of the distance of the car from plaintiff's intestate and its speed of 35 miles when first observed, and also the fact that the car slackened its speed and then immediately increased it up to and running across the intersection, and then conclude whether or not the court erred in not submitting the facts to a jury.

The facts are not seriously disputed that the car was lighted and could be seen coming from the north 125 to 150 feet away; that it was traveling 35 miles an hour when plaintiff's intestate appeared on the northeast corner of Waveland Avenue and Clark Street; that he was facing west when the street car approached within 75 feet of Waveland Avenue, and after signalling, ran in front of the car and was struck.

What happened is best illustrated by the testimony of the witness Richard Thomasius, who was present and saw the occurrence from the time Quail started to run until he met his death. He testified that he was a Division Marshal of the Chicago Fire Department, and that he had known plaintiff's intestate for about ten years; that at the time of the accident he, Thomasius, was at the northwest corner of Waveland and Clark Street, mailing some letters, and was facing east; that he saw plaintiff's intestate, who had been at Thomasius' fire station, situated at 1052 Waveland Avenue, coming west on the north sidewalk of Waveland Avenue. Thomasius said:

> "As I saw the man running across Clark street he was coming along on the crosswalk of Waveland avenue crossing Clark

The authorities did [illegible] at the plain-
tiff to pass in front of the moving street car a [illegible] of itself also
contributory negligence. The question [illegible] and [illegible], as a reasonably
prudent man under [illegible] circumstances, in [illegible] the front
of this car as it was approaching, was [illegible] in question of [illegible]

In the determination of [illegible] the court considers the
question of the distance of the car [illegible] infinitely interesting and
its speed of 30 miles when first [illegible], [illegible] that
the car slackened its speed [illegible] immediately [illegible] as to
and running across the intersection, and [illegible] whether or
not the court erred in not submitting the [illegible] to the jury.

The facts are not seriously disputed. It is [illegible] the car was
lighted and could be seen coming from the north [illegible] 150 feet away
that it was travelling 15 miles an hour when [illegible] intersection
appeared on the northeast corner of [illegible] that
that he was going east when the street [illegible] within 70
feet of Wayland avenue, [illegible] front of the
car and was struck.

What happened is not [illegible] of
the witness Richard [illegible] occurrence
from the time [illegible] to run until [illegible]. He
testified that he was a division [illegible] department, and that he [illegible] years; that at the time of the accident [illegible] at the
northwest corner of [illegible] and was going east; [illegible] who had been
at Thomasville fire [illegible] coming
west on the north sidewalk of [illegible] Thomasville said:

"As I saw the car coming across Clark street he was coming
along on the crossing of Wayland [illegible] Clark

street.

The man was running in my direction where I was standing, running straight across the walk, running a little towards him like that (indicating). When the man started running I looked at the street car. I saw it perfectly plain coming right down toward Waveland. No one waiting to get on.

The street car, when the man started running, was about 125 feet to 150 feet north of Waveland. I saw him running when he stepped off the curb. When he stepped off the curb the street car was about seventy-five feet from the north side of Waveland. At that point he was not thirty-five to forty feet east of the southbound track, he was about twenty-five feet east of the southbound track. Probably he ran right out to the car track until he came in contact with the car. I do not know if he was running at the time he came in contact with the street car. The street car and the man met at the track. Theymet at the track and the crosswalk at Waveland avenue. I didn't see him fall. The street car came between me and the man.

I observed him running, and he hesitated, and came across the street towards me; and it seemed he threw up his hands, his right hand, and came on; and as he did he reached the center tracks, or I should say the east track of the southbound road; and was struck by the street car on the left front, about a foot from the motorman - a foot to the left of the motorman."

In this case there was a further witness, a Mr. Henry Mollerus, who was in the car at the time it was approaching Waveland Avenue. His evidence was that while he was able to see the man at a certain point, he was unable to see all that happened on the evening in question. His evidence was to the effect that the motorman threw off the switch and slackened the speed of the car, and then immediately started up; that the approach of the car was not obstructed by anything that interfered with the view of anyone present; that the lights on the inside of the car were burning, and the headlight was also burning.

There is no doubt that the street car was visible at a point 75 feet north of the intersection and was running at a speed of 35 miles an hour when its speed was slackened, but as to what mileage, the record is silent. The street car, however, immediately resumed its speed at the time of the accident.

street.

The man was [illegible] running in my direction [illegible] approaching, running at full speed [illegible] a little towards the side that ([illegible]) [illegible] man started running. I looked at [illegible] man. I saw it particularly [illegible] [illegible] land. He was [illegible] to get in.

The street car, when the man started running, was about 150 feet to 180 feet north of Wolcott. [illegible] him running when he stepped off the curb. When he stepped off the curb the street car [illegible] twenty-five feet from the north side of Wolcott. [illegible] he was not thirty-five to forty feet east of the [illegible] track. He was about twenty-five feet east of the [illegible] bound track. Somebody he ran right out [illegible] until he came in contact with the car. I do not know if he was running at the time he came in contact with the street car. The street car and the man met [illegible] the track. They met at the track and the [illegible] I didn't see him fall. The street car came [illegible] the man.

I observed him running, and [illegible] across the street towards me; [illegible] threw up his hands, his right hand, and [illegible]; and as he did he reached the center track, or I should say the east track of the southbound road; and was struck by the street car on the left front, about [illegible] foot from the motorman - [illegible] foot to the left of the motorman."

In this case there [illegible] witness, [illegible] Jerry Mollerus, who was in the car at the time it was approaching Wolcott Avenue. His evidence was that while he [illegible] the man at a certain point, he was unable to [illegible] on the evening in question. His evidence [illegible] the effect that the motorman threw off the switch and slackened the speed of the car, and then immediately started [illegible] obstructed by anything that intervened [illegible] that the lights on the inside of the [illegible] and the headlight was also burning.

There is no doubt that the street car was visible at a point 75 feet north of the intersection [illegible] speed of 35 miles an hour when its speed was slackened, but as to what mileage, the record is silent. The street car, however, immediately resumed its speed at the time of the collision.

In the discussion of the law having a bearing upon the attempt of persons to pass in front of a moving street car, the authorities in passing upon like questions are in accord, and the rule of this court which applies, is stated in the case of Deming, Admr. v. Chicago Railways Company, et al. 234 Ill. App. 642,

> "Where persons have been injured acting upon the expectation that a car would stop because it was signaled or was slowing down, it has been held under varying circumstances that it was negligence to act upon such assumption. (Welch v. C. C. Ry. Co., 208 Ill. App. 161; Nelson v. C. C. Ry Co. 194 id. 615; Ramsay, Admr. etc. v. Ch. Ry. Co., No. 25772, filed March 8, 1920; Winchell v. St. Paul City Ry. Co., 86 Minn. 445, 90 N. W. 1050; Dering v. Mil. Elec. Ry. & Light Co., (Wis.) 176 N. W. 343; Thompson v. Met. St. Ry. Co., 89 App. Div. 10, 85 N. Y. S. 181.)
>
> It was said in the Ramsay case that if the deceased expected the car to stop, 'ordinary prudence would have required him to wait until he could have crossed in front of it in safety.' In the Winchell case the court said that plaintiff had no right to rely upon the motorman bringing his car to a stop. In the Dering case the court said where one was hit crossing in front of a car, that when he reached the zone of danger it was his duty to look and see if the car had started; that if he did not look or looked and took his chance to cross ahead of it, in either case he was negligent. In the Thompson case the court said that where one had crossed in front of a car, probably assuming that because it had slowed up it would come to a stop, and he could cross the street safely, he had no right so to assume, and there should have been an instructed verdict."

In applying this rule, the court in the case of Foreman Trust & Savings Bank, a Corp. Admr. v. The Chicago Surface Lines, et al 263 Ill. App. 652, reiterated the rule applicable in a case of the character before us, as follows:

> "The rule is that failure to look before crossing a street car track is not always negligence per se, but it is likewise true that the circumstances may be such as to make such an act negligence, as a matter of law. Van Meter, Admr. v. C. Rys. Co., et al., 240 Ill. App. 371; Nelson v. C. C. Ry. Co. 194 Ill. App. 615; Ehrenstrom v. C. C. Ry. Co. 205 Ill. App. 583; Roberts v. C. C. Ry. Co. 262 Ill. 228; Myhre v. C. C. Ry. Co. 216 Ill. App. 128."

Again, it was said in the case of Welch v. Chicago City Railway Co., 208 Ill. App. 161, which has a bearing upon a like question in the instant case:

In the leading [illegible] case, the attempt of persons to [illegible] authorities in [illegible] rule of this court which [illegible] Adams v. Chicago Milwaukee [illegible], 164 Ill. [illegible], [illegible]:

> "Where persons have been injured [illegible] the exception that if a car would stop [illegible] closing down, it has been held [illegible] that it was negligence to cut [illegible] v. C. O. Ry. Co., 30 Ill. App. 163; Nelson v. [illegible] 190 Id. 815; [illegible] v. [illegible] filed March 8, 1920; [illegible] v. [illegible] 86 Minn. 448, 90 N. W. 1090; [illegible] v. Ill. Elec. Ry. [illegible] Light Co., (mis.) 176 [illegible]; [illegible] v. [illegible] Co., 89 App. Div. 10, 85 N. Y. S. 1011.)
>
> It was held in the [illegible] case that [illegible] excused the [illegible] to stop, "ordinarily [illegible] required him to wait until he could have crossed in front of it in safety." In the [illegible] case the court held that plaintiff had no right to rely upon the motorman giving his car to a stop. In the [illegible] case the court held where one was not crossing in front of a car, that when he reached the zone of danger it was his duty to look and see if the car had stopped; that if he did not look or looked and took his chance to cross ahead of it, in either case he was negligent. In the Thompson case the court held that where one had crossed in front of a car, [illegible] that because it had slowed up [illegible] he could cross the street [illegible] to assume, and there was [illegible] verdict."

In applying this rule, the court in the case of Foreman Trust & Savings Bank, a Corp., Adm., v. The Illinois Surface Lines, et al., 263 Ill. App. 582, reiterated the [illegible] in [illegible] case of the character before us, as follows:

> "The rule is that [illegible] car track is not [illegible] wise true that the circumstances [illegible] such an act negligence. [illegible] v. C. Rys. Co., et al., 243 Ill. [illegible] 71; [illegible] Ry. Co. 194 Ill. [illegible]; [illegible] Ill. App. 386; Roberts v. C. O. [illegible] v. C. C. Ry. Co. 218 Ill. [illegible]."

Again, it [illegible] in the [illegible] v. Illinois City Railway Co., 208 Ill. [illegible], where [illegible] upon a like question in the instant case:

> "Evidently she expected the eastbound car to stop at the southeast corner of Aberdeen and 63rd streets to take on the two women who stood there in the street at that corner. * * * The testimony tends to prove that the car was, at the time, traveling fast and that no bell was sounded or signal given at or near the crossing. * * *
>
> The evidence tends to show that the proximate cause of her injury was not the negligence of the defendant but rather that of herself. * * * She may have expected the defendant to stop the car at the corner, but there is no rule of law which requires a street railway company to stop its cars at all points upon a signal to take on passengers; and it follows that the failure to stop for prospective passengers who may be standing at the street corner does not of itself prove actionable negligence. Westerman v. U. Rys. Co. of Baltimore, 96 Atl. 355; Winchell v. St. P. St. Ry. Co., 90 N. W. 1050."

In Pienta v. C. C. Ry. Co., 284 Ill. 246, it was held that the failure to ring a bell or gong to warn of the approach of a street car could not be held to be the proximate cause of an injury resulting from a collision, when it appeared that a person injured had notice of the approach of the car.

In Gordon A. Ramsay, Admr. v. Chicago Railways Co., et al., 217 Ill. App. 646, the court announced the well known principle of law in this language:

> "No principle of law is more firmly supported by authority than the one which declares that at common law one assumes all risks that arise from his own contributory negligence and that where such negligence proximately contributes to cause an injury there can be no recovery therefor, even against a defendant guilty of negligence contributing to cause an accident."

Plaintiff's intestate was chargeable with the duty at the time and just prior to the accident of looking for the approaching street car, and we assume that the car slackened speed when he looked, and then increased its speed, but it would not be reasonable to assume from this fact, under all the circumstances, that plaintiff's intestate, in undertaking to cross in front of the car while it was still moving, did not take a chance.

The plaintiff in the instant case does not raise the question that the car was being operated at the time at an unlawful and unusual rate of speed. This was the salient factor in the case

"Evidently she [illegible] the southeast corner of Sixteen and Spruce streets and the defendant's car was [illegible] on the two rails [illegible] at that corner. * * * The testimony tends to show that the car was, at the time, [illegible] bell was sounded or signal given [illegible] the crossing. * * *

The evidence [illegible] of her injury was not the negligence of the defendant but rather that of herself. * * * [illegible] have concerned the defendant to stop the car at the crossing, but there is no rule of law which requires a street car [illegible] to stop its car at all points [illegible] passengers; and it follows that the failure to stop for prospective passengers can [illegible] the street corner does not of itself prove actionable negligence. Weisenman v. [illegible] Co. of Philadelphia, 99 Pa. [illegible]; Kimball v. [illegible], 20 N. [illegible] 1.[illegible]."

In Pionke v. [illegible] Co., 254 [illegible], it [illegible] that the failure to ring a bell or [illegible] to [illegible] street car could not be held to be the proximate cause of the injury resulting from a collision, when it appeared that [illegible] had notice of the approach of the car.

In Gordon v. [illegible], [illegible] v. [illegible], [illegible] 217 Ill. App. 666, the court announces the well known principle of law in this language:

> "No principle of law is more firmly [illegible] than the one which declares that [illegible] all risks that arise from his own contributory negligence and that where such negligence proximately contributes to cause an injury there can be no recovery therefor, even against a defendant guilty of negligence [illegible] to cause an accident."

Plaintiff's instructions [illegible] the time and just prior to the accident of the [illegible] approaching street car, and we assume that the car in question [illegible] when he looked, and then increased its speed, but it could not be reasonable to assume from this fact, under all the circumstances, that plaintiff's intestate, in undertaking to cross in front of the car while it was still moving, did not take a chance.

The plaintiff in the instant case does not raise the question that the car was being [illegible] at an unlawful and unusual rate of speed. This was the salient factor in the case

of Loftus v. Chicago Rys. Co., 283 Ill. 475, cited by the plaintiff.

In the discussion of the merits of her case, plaintiff, cites, in addition to the case of Loftus v. Chicago Rys. Co., supra, Kelly v. Chicago City Ry. Co., 283 Ill. 640; Griswold v. Chicago Rys. Co., 253 Ill. App. 498; and Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402.

In the Kelly case, the facts disclose that in turning a corner of an intersecting street, the overhang of the rear platform of the street car as it rounded the curve, struck the defendant and knocked him to the ground and injured him. The theory of the street car company was that the danger from being hit by the overhanging end of the car in rounding the curve was as open and obvious to plaintiff as it was to the servants of appellant. The court in answer to this contention said:

> "It is the general rule, as contended by appellant, that it is not negligence per se for a street car company to fail to stop a car on signal at a corner, (South Chicago Railway Co. v. Dufresne, 200 Ill. 456,) and that a motorman may rightfully assume, in rounding a curve, that an adult person standing near the tracks and apparently able to see, hear and move, and who has knowledge of the curve in the track and that in rounding a curve the rear end of a street car will swing beyond the track, will draw back and avoid injury, and the motorman is under no obligation to warn such person against such open and obvious danger."

The court held that the motorman of the car saw the persons standing at the point where the car rounded the curve and this was notice to him that they were there to take the car, and expected it to stop at that point. The facts in the Kelly case are not the same as those in the instant case. The question in the instant case is: Did the deceased in his lifetime exercise due care for his own safety at the time he approached the tracks and attempted to pass in front of the street car, when it was obvious that the car was traveling at a rate of speed that would not justify such attempt? He was struck by the corner of the car as he reached the tracks, and was injured. The

of Loftus v. Thiede & Bro. Co., [illegible] Ill. [illegible], [illegible]. In the discussion of the merits [illegible] cites, in addition to the case of Loftus [illegible] Kelly v. Chicago City Ry. Co., [illegible] Ill. [illegible]; [illegible] v. Chicago Rys. Co., 255 Ill. 4, 486; [illegible] v. [illegible] Co., 312 Ill. 402.

In the Kelly case, the [illegible] corner of an intersecting street, the [illegible] of the street car as it rounded the curve, [illegible] and knocked him to the ground and injured him. [illegible] the street car company was the [illegible] bumping end of the car in rounding the curve [illegible] to plaintiff as it was in the [illegible] answer to this contention said:

> "It is the general [illegible] to [illegible] that it is not negligence [illegible] to fail to stop a car on [illegible] Chicago Railway Co. v. Hickman, [illegible] Ill. 486, [illegible] that a motorman may rightfully assume, in [illegible] adult person attempting [illegible] to see, hear and have, and who has [illegible] in the track and is in rounding a curve [illegible] a street car will swing beyond the track [illegible] and avoid injury, and the motorman is under no [illegible] to warn such person against such [illegible]."

The court held that the motorman [illegible] at the point where the car rounded [illegible] him that they were there [illegible] at that point. The facts in the Kelly case [illegible] in the instant case. The question in [illegible] decedent in his lifetime exercise [illegible] time he approached the [illegible] street car, when it [illegible] of speed that would [illegible] corner of the car [illegible] injured. The

rule in the Kelly case was approved in the other two cases, - the Griswold case and The Northern Trust Company case, in both of which it was determined that the question of negligence and contributory negligence involved in these cases should have been submitted to the jury, and it was submitted and the judgment affirmed by this court, and upon appeal was affirmed by the Supreme Court. In the instant case, the fact that the intestate raised his hand to signal the approaching car, while in the act of running to cross the track in front of the moving car, would not of itself relieve him of the duty at that time to exercise due care and caution for his safety. He did not exercise such care.

The facts in this case, while unfortunate, are such that the deceased was guilty of contributory negligence at the time and just prior to the time of the accident, and the court in directing the jury to return a verdict for the defendant, did not err. The judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

6

rule in the early case [illegible] - the
Gatewold case and the [illegible] case
it was determined that [illegible] contributory
negligence involved in the [illegible] to the
jury, and it was submitted [illegible]
and upon appeal was affirmed [illegible]
case, the fact that the [illegible]
approaching car, while [illegible]
front of the moving car, [illegible]
duty at that time to exercise [illegible]
he did not exercise such [illegible].

The facts in this case [illegible]
that the deceased [illegible] duty of [illegible]
and just prior to the time of the [illegible] direct-
ing the jury to return a verdict for the [illegible]
The judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DOYLE E. MCCLATCHY, J., [illegible].

38351

OVERHEAD DOOR COMPANY OF ILLINOIS,
a Corporation,

Complainant - Appellant,

v.

ADOLPH H. BERNSTEIN, et al.,

(Defendants) Appellees.

JASON A. IMES and DAVID REST, trading as M. REST & SON,

Interveners Cross Appellants,

v.

ADOLPH H. BERNSTEIN,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

285 I.A. 587

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant, Overhead Door Company of Illinois, a corporation, and the defendants and interveners, Jason A. Imes, contractor, and David Rest, trading as M. Rest & Son, from a decree entered in the Circuit Court of Cook County, dismissing the bill of complaint and the intervening petitions for want of equity.

The complainant filed its bill to enforce a mechanic's lien upon the property of Adolph H. Bernstein, one of the defendants.

The defendants, Jason A. Imes and David Rest, filed their answers in the nature of intervening petitions, for the purpose of enforcing a mechanic's lien. The cause was referred to a Master in Chancery, who was subsequently appointed a special commissioner, and by his report found against the complainant and the defendants, in seeking to maintain their claims for mechanics' liens.

Objections were filed with the Master in Chancery, and the objections were allowed by court to stand as exceptions to the Master's report. Upon a hearing the court overruled all exceptions and dismissed the bill of complaint and the interveners' petitions

38351

OVERHEAD DOOR COMPANY OF ILLINOIS, a Corporation,	
Complainant - Appellant,	
v.	
ADOLPH H. BERNSTEIN, et al.,	
(Defendants) Appellees.	
JASON A. IMES and DAVID REST, trading as M. REST & SON,	
Intervenors Cross Appellants,	
v.	
ADOLPH H. BERNSTEIN,	
(Defendant) Appellee.	

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This is an appeal by the complainant, Overhead Door Company of Illinois, a corporation, [illegible] the defendants and intervenors, Jason A. Imes, county clerk, and David Rest, trading as M. Rest & Son, from a decree entered in the Circuit Court of [illegible] County, dismissing the bill of complaint and [illegible] the intervening petitions for want of equity.

The complainant filed its bill to foreclose a mechanic's lien upon the property of Adolph [illegible] Bernstein, [illegible] The defendants, Jason [illegible], [illegible] filed their answers in the nature of intervening petitions, [illegible] purpose of enforcing a mechanic's lien. The cause was referred to master in Chancery, who was subsequently succeeded by a master [illegible], and by his report found against the complainant and the defendants in seeking to maintain their claims for [illegible] liens.

Objections were filed with the master in Chancery, and the objections were allowed by court to [illegible] exceptions to the Master's report. Upon a hearing the court overruled all exceptions and dismissed the bill of complaint and the intervenors' petitions

for want of equity, as we have indicated above.

The complainant, by its bill, alleges that on July 6, 1929, the defendant, Adolph H. Bernstein, was the owner of the real estate therein described, and also known as 627-31 West Adams Street, Chicago, Illinois, the subject of this controversy.

The parties to this appeal contend that where an owner agrees without restrictions that the lessee by his lease shall place buildings or other improvements on the owner's property, he thereby authorizes and knowingly permits his property to be improved within the meaning of the Mechanics' Lien Act, and cannot be heard to say as against a claim for mechanics' liens that the improvement is undesirable or unprofitable.

The fact is that the lease between the defendant owner, Adolph H. Bernstein, lessor and Joseph Rothschild and Albert Rothschild, lessees, by its terms authorized the lessees to erect buildings and make improvements. The lessor sought to protect himself by providing in the lease that the lessees were to give an indemnity bond to protect the defendant owner against liens. The defendant, Bernstein, testified that when he found that the buildings were being constructed upon his property he went to the lessees, who told him that they would furnish a bond. The bond was never provided for by the lessees, nor delivered to Bernstein.

From the facts it also appears that Bernstein never obtained a waiver of lien from the contractors, as provided for in the lease.

In the case of Fehr Construction Co. v. Postl System, 288 Ill. 634, the court held that an owner who agrees, without restriction, that the lessee shall place buildings or other improvements upon his property, thereby authorizes or knowingly permits his property to be improved within the meaning of the Mechanic's Lien act, and cannot be heard to say, as against a claim for lien, that the cost is excessive or the improvement undesirable or unprofitable. What the court said

for want of equity, as we have indicated [illegible].

The complainant, by its [illegible], [illegible] on the 1st day of [illegible], 1929, the defendant, Adolph H. Bernstein, [illegible] the owner of [illegible] premises therein described, and also known as [illegible] West [illegible] Street, Chicago, Illinois, the subject of this controversy.

The parties to this suit entered into a [illegible] agreement without restrictions that the lessee by his lease [illegible] all right buildings or other improvements on the owner's property, he thereby authorizes and knowingly permits his property to be improved within the meaning of the Mechanics' Lien Act, and cannot be [illegible] to say as against a claim for mechanics' lien that the improvement is undesirable or unprofitable.

The fact is that the lease between the defendant owner, Adolph H. Bernstein, lessor and Joseph Rothschild and Albert Rothschild, lessees, by its terms authorized the lessees to erect buildings and make improvements. The lessor sought to protect himself by providing in the lease that the lessees were to give an indemnity bond to protect the defendant owner against liens. The defendant, Bernstein, testified that when he found that the buildings were being constructed upon his property he went to the lessees, who told him that they would furnish a bond. The bond was never furnished for by the lessees, nor delivered to Bernstein.

From the facts it also appears that Bernstein never [illegible] a waiver of lien from the contractors, [illegible] provided for in the lien [illegible].

In the case of Fehr Construction Co. v. Metz, 258 Ill. 634, the court held that an owner who agrees, without restriction that the lessee shall erect buildings or other improvements upon his property, thereby authorizes or knowingly permits the property to be improved within the meaning of the Mechanics' Lien Act and cannot be heard to say, as against a claim for lien, that the cost is excessive or the improvement undesirable or unprofitable. That the court said

in its opinion applies in the instant case, and where the owner of the real estate permits the lessees of the property in question to erect a building and make improvements thereon, the amounts due contractors for the erection of the building come well within the Mechanics' Lien Act.

The defendant Bernstein in this case cannot be heard to complain of the desirability of the structure after the same has been erected, for there were no restrictions as to the character of the improvement under the terms of the lease.

It was further suggested by complainant that under the present statute an owner knowing an improvement is being made must object to the improvement; otherwise he knowingly permits the improvement, and thereby consents.

The defendant had actual notice, in writing, on July 6, 1929, when he signed an application for a permit, which was filed with the City Fire Department, in order to install gasoline tanks on the premises in question.

From the application signed by the defendant Bernstein and offered in evidence, it appears that oil was to be sold outside of a one story building, brick construction, upon the then vacant property of the defendant Bernstein; that in July, when Mr. Bernstein passed this property he saw men working and conferring with the defendant Imes, the contractor then at work. At that time no objection was made by the owner to the contractor regarding the construction of the proposed building. Failure of an owner to object to the character of the improvement then being made, is an indication that he knowingly authorized and permitted the improvement to go on to completion, and the contractors interested in doing the work are entitled to a lien for the amounts due under the terms of their several contracts. Friebele v. Schwartz, 164 Ill. App. 504; Haas Electric Co. v. Amusement Co., 236 Ill. 452.

in its opinion applies in the instant case, and that the owner of the real estate permits the lessees of the property in question to erect a building and make improvements thereon, the amounts due contractors for the erection of the building can not within the Mechanics' Lien Act.

The defendant Kornstein in this case cannot be heard to complain of the desirability of the structure after the same has been erected, for there were no restrictions as to the character of the improvement under the terms of the lease.

It was further suggested by complainant that under the present statute an owner knowing an improvement is being made must object to the improvement; otherwise he knowingly permits the improvement, and thereby consents.

The defendant had actual notice, in writing, on July 6, 1929, when he signed an application for a permit, which was filed with the City Fire Department, in order to install gasoline tanks on the premises in question.

From the application signed by the defendant Kornstein and offered in evidence, it appears that oil was to be sold outside of a one story building, which construction, upon the then vacant property of the defendant Kornstein; that in July, when Mr. Kornstein passed this property he saw men working and conferring with the defendant Imes, the contractor then at work. At no time no objection was made by the owner to the contractor regarding the construction of the proposed building. Failure of an owner to object to the character of the improvement then being made, is an indication that he knowingly authorized and permitted the improvement to go on to completion, and the contractors interested in doing the work are entitled to a lien for the amounts due under the terms of their several contracts. Friebele v. Schwartz, 164 Ill. App. 504; Hess Electric Co. v. Amusement Co., 326 Ill. 452.

The building erected on the premises is forty by fifty feet, and is constructed of cement, brick, and steel, and substantially built. The foundations are from five to eight feet in depth, and the walls are thirteen inches in thickness. This building, no doubt, complies with the city ordinances, at least the structure was not objected to by city officials as not complying with city regulations.

The complainant seeks to establish its lien for nine overhead doors, which were fastened to and became a part of the building. From the character of the structure, the use for which it was erected, and the materials used, it is apparent that the improvement was a permanent one.

The next question to be considered is whether the real estate was enhanced in value by the improvement, and if so, was such proof necessary under Ch. 82 of Sec. 16 of the Mechanics' Lien law, which provides for proof of enhancement in value only where the lien claimant pro rates with an incumbrancer. The evidence does not disclose that an incumbrance is involved in the litigation such as would make proof necessary. For that reason the question of enhancement in value of the real estate is not involved. Westphal v. Berthold, 273 Ill. App. 266. There is evidence, however, that the erection of the building did enhance the value of the real estate from $6,000 to $10,000, which, of course, includes the amount of the mechanics' liens.

It is evident, from the fact that by the construction of the building provided for in the lease, defendant Bernstein benefited to the extent of from $350 to $400 per month rentals. It follows that the lease must be considered by the court, which provides for a five year term and in the event of a default by the lessees, or assigns, in any of the provisions of the lease, the title to the improvements shall inure to and become the property of the landlord -

The building erected on the premises is twenty by twenty feet, and is constructed of poles, with a shed, substantially built. The round poles are from five to seven feet in length, and the walls are thirteen inches in thickness. The building, no doubt, complies with the city ordinances, of which the lessee was not objected to by city officials as not complying with city regulations.

The complainant seeks to enforce his lien for time overhead doors, which were fastened to the posts of the building. Upon the ch roofer of the structure, the use for which it was erected, and the materials used, it is [illegible] that improvement was a permanent one.

The next question to be considered is whether the real estate was enhanced in value by the improvement, and if so, whether proof necessary under Ch. 55 of Sec. 20 of the mechanics' lien law, which provides for proof of enhancement in value only where the lien claimant pro rates with an incumbrancer. The evidence does not disclose that an incumbrance is involved in the litigation such as would make proof necessary. Nor that reduce the question of enhancement in value of the real estate is not involved. Lehman v. Berthold, 273 Ill. App. 366. There is evidence, however, that the erection of the building did enhance the value of the real estate from $8,000 to 10,000, which, of course, includes the amount of the mechanics' lien.

It is evident, from the fact that the [illegible] of the building provided for in the lease, [illegible] to the extent of from [illegible] to [illegible]. It follows that the lease must be considered by the parties, which provides for a five year term and in the event of default by the lessee, or assigns, in any of the provisions of the lease, the title to the improvements shall inure to and become the property of the landlord -

the defendant owner of the real estate. In any event, if title is not claimed to the improvement, the landlord has enjoyed the income by reason of its construction.

The defendant had notice of the construction by being personally upon the premises at the time the work was going on, and also by his agent, who collected rent from the lessees for the owner and visited the property for that purpose, and who had knowledge of the work, and it will be presumed that this knowledge was imparted to the defendant landowner, even though the agent did not have authority to enter into a contract for the work and thus bind his principal. Mutual Construction Co. v. Baker, 237 Ill. App. 596.

It will not be necessary to consider several motions made and reserved by the court to the hearing, for the reason that the conclusion of the court disposes of the rights of the parties.

It necessarily follows from the conclusion reached by the court that the chancellor erred in overruling complainant's as well as defendant interveners' exceptions to the master's report, and in dismissing the claims for want of equity. Therefore, the decree of dismissal is reversed and the cause remanded to the Circuit Court of Cook County, with directions that the chancellor enter a decree granting the mechanics' liens prayed for in the bill of complaint and the defendant interveners' petitions for the several amounts to be a lien upon the property of the defendant owner.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

the defendant owner of the real estate. In any event, if title is not claimed to the improvement, the lienholder may enjoyed the income by reason of its construction.

The defendant had notice of the construction by being personally upon the premises at the time the work was going on, and also by his agent, who collected rent from the tenants for the owner and visited the property for that purpose, and no [illegible] knowledge of the work, and it will be presumed that this knowledge was imparted to the defendant landowner, even though the agent did not have authority to enter into a contract for the work. [illegible] Mutual Construction Co. v. Ryder, 227 Ill. App. 4, 5.

It will not be necessary to consider [illegible] and reserved by the court to be [illegible], for [illegible] the conclusion of the court disposes of the rights of the parties.

It necessarily follows from the conclusion reached by the court that the chancellor erred in overruling complainant's as well as defendant intervenors' exceptions to the master's report, and in dismissing the claims for want of equity. Therefore, the decree of dismissal is reversed and the cause remanded to the circuit court of Cook County, with directions that the chancellor enter a decree granting the mechanics' liens asserted by the bill of complaint and the defendant intervenors' petitions for the several amounts to be a lien upon the property of the defendant owner.

REVERSED AND REMANDED WITH DIRECTIONS.

HALL, P.J., AND DEMPS E. DUNLAP, J., CONCUR.

38380

WESTERN SUBURBAN FINANCE & THRIFT COMPANY, a corporation,

Appellee,

v.

EDWARD A. GRAHAM, JOHN DOE, and MARY ROE,

Appellants,

Consolidated with -

WESTERN SUBURBAN FINANCE & THRIFT COMPANY, a corporation,

Appellee,

v.

EDWARD A. GRAHAM, R. CLARK, JOHN DOE and MARY ROE,

Appellants.

APPEALS FROM

MUNICIPAL COURT

OF CHICAGO.

285 I.A. 587

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants Edward A. Graham and R. Clark from judgments entered by the Municipal Court of Chicago in two actions of replevin instituted by the West Suburban Finance & Thrift Company against these defendants. In each case in the Municipal Court, the findings and judgments were in favor of the West Suburban Finance & Thrift Company. The actions of replevin involved the title to certain store fixtures located in two stores in the City of Chicago, one at 933 South Western Avenue, and the other at 608 South Kedzie Avenue. At the time the replevin suits were instituted the defendants were in possession of the personal property in these stores. Upon appeal this court has consolidated for hearing the two appeals, Nos. 38380 and 38381, and permitted the filing of one set of abstracts and briefs to cover both cases. No questions as to the pleadings are involved, and the facts are substantially the same in the two appeals, except as to the right of the defendant R. Clark to possession of the properties in question.

WESTERN SUBURBAN FINANCE & THRIFT COMPANY, a corporation,

Appellee,

v.

EDWARD A. GRAHAM, JOHN DOE, and MARY ROE,

Appellants.

Consolidated with --

WESTERN SUBURBAN FINANCE & THRIFT COMPANY, a corporation,

Appellee,

v.

EDWARD A. GRAHAM, R. CLARK, JOHN DOE and MARY ROE,

Appellants.

MR. JUSTICE [illegible] delivered the opinion of the court:

This is an appeal by the defendants [illegible] and R. Clark from judgments entered by the municipal court of Chicago in two actions of replevin instituted by the West Suburban Finance & Thrift Company against these defendants. In each case in the Municipal Court, the findings and judgments were in favor of the West Suburban Finance & Thrift Company. The actions of replevin involved the title to certain store fixtures located in the stores in the City of Chicago, one at 7[illegible] South [illegible] Avenue, and the other at 808 South Kedzie Avenue. [illegible] the replevin suits were instituted the defendants were in possession of the personal property in these stores. Upon appeal this court [illegible] for hearing the two appeals, Nos. [illegible], and [illegible] the filing of one set of abstracts and briefs [illegible]. No questions as to the [illegible] are involved, [illegible] substantially the same in the two appeals, [illegible] the defendant R. Clark to possession of the [illegible] in question.

The facts upon which these judgments were predicated are, substantially, that one Thomas Falone, prior to May 1, 1934, had operated a chain of butcher shops in the City of Chicago. One of the shops was located at 933 South Western Avenue, and another at 608 South Kedzie Avenue. On May 1, 1934, Falone went to the plaintiff, the West Suburban Finance and Thrift Company, a corporation engaged in the general finance business and in lending money, and borrowed from plaintiff $1,500. As a condition to making the loan, the plaintiff required Falone to execute bills of sale covering the fixtures located in the stores at 933 South Western Avenue and 608 Kedzie Avenue. At this time Falone and the plaintiff entered into what is called a conditional sales contract as to each of the stores, under the terms of which the plaintiff purported to resell to Falone the fixtures in the store at 933 South Western Avenue for the sum of $600, payable in monthly installments of $50, and the fixtures in the store at 608 South Kedzie Avenue for the sum of $643, payable in monthly installments of $53.60, title to be in the plaintiff until payments were made.

Of the total amount borrowed, and there seems to be no question that the money was loaned to Falone under the terms of the agreements just described, Falone repaid $200 to be applied on the contracts.

On September 20, 1934, Thomas Falone executed an agreement, which is referred to in the briefs as an assignment for the benefit of the creditors, to Edward A. Graham, as trustee, Upon the execution of the contract for the benefit of creditors, Edward A. Graham took possession of the stores located at 933 South Western Avenue and 608 South Kedzie Avenue, and operated a meat market at each location. Thereafter, on February 21, 1935, Graham sold the fixtures located in the Kedzie Avenue store to the defendant Clark for

The facts upon which these judgments are predicated are, substantially, that one Thomas Malone, prior to May 1, 1934, had operated a chain of butcher shops in the City of Chicago. One of the shops was located at 922 South Western Avenue, and another at 808 South Kedzie Avenue. On May 1, 1934, [illegible] to the plaintiff, the Joint Industrial Finance and Thrift Corporation, a corporation engaged in the general finance business in Chicago, and borrowed from plaintiff $1,500. As a condition [illegible] the loan, the plaintiff required Malone to transfer [illegible] the fixtures located in the stores at 922 South Western Avenue and 808 Kedzie Avenue. At this time Malone [illegible] entered into what is called a conditional sales contract [illegible] under the terms of which the plaintiff [illegible] to Malone the fixtures in the store at 922 South Western Avenue for the sum of $600, payable in monthly installments of $[illegible], and the fixtures in the store at 808 South Kedzie Avenue for the sum of $[illegible], payable in monthly installments of $[illegible]. [illegible] plaintiff until payments were made.

Of the total amount borrowed, [illegible] appears to be no question that the money was loaned to Malone [illegible] the agreements just described, [illegible] on the contracts.

On September 24, 1934, Thomas [illegible] agreement which is referred to in the briefs as [illegible] of the benefit of the creditors, to Edward [illegible] Brunner, [illegible] tion of the contract for the benefit of creditors, [illegible] took possession of the stores located at 922 South Western Avenue and 808 South Kedzie Avenue, and operated [illegible] at each location. Thereafter, on February 1, 1935, Brunner sold the fixtures located in the Kedzie Avenue store [illegible] the defendant Glenn for

$1500. It is also a part of the record that on September 29, 1934, Graham addressed a letter to all of the creditors of Thomas Falone advising them of the execution of the assignment for the benefit of creditors, and also advising them that he had taken over the operation of the stores and of his intention to assume the management and supervision thereof, and to pay the creditors out of the proceeds of the operation, and further advising them of his intention to reconvey his establishments to Falone on payment in full to the creditors.

During the course of the trial there was introduced in the case now here on appeal, an assignment for the benefit of creditors, dated January 9, 1935. This assignment was signed, by Falone, Graham and a number of the creditors of Falone. On March 6, 1935, the plaintiff served notice on Graham claiming title to the fixtures in the two stores and demanding possession thereof, which was refused, and as a result two actions of replevin were instituted by the plaintiff, and the court, upon a hearing, found right to possession of the property to be in the plaintiff, and entered such judgment.

The defendants contend that the transaction between Thomas Falone and the plaintiff, while in form purporting to be a conditional sales contract, was in fact a chattel mortgage to secure the amount of money loaned by the plaintiff, and the fact that the instruments were not recorded made them void as against the rights of the creditor who were in possession of the property through their assignee or trustee, and also as against the defendant R. Clark.

It is a well established doctrine of law in this State that where a bill of sale is given as security to provide for the payment of an account, it is held to be a chattel mortgage, and this was reiterated in a case entitled, The Southern Surety Company v. The People's State Bank of Astoria, 332 Ill., 362, where it is said:

$1500. It is also a part of the [illegible] on September 24, 1924, Graham addressed a letter to all of the creditors of Thomas Malone advising them of the execution of the assignment for the benefit of creditors, and also advising them of the [illegible] over the operation of the stores and of his intention to resume the management and supervision thereof, and to pay the creditors out of the proceeds of the operation, and further advising them of his intention to recover his establishments to claims on payment in full to the creditors.

During the course of the trial there was introduced in the case now here on appeal, an assignment for the benefit of creditors, dated January 6, 1925. This assignment was signed, by Malone Graham and a number of the creditors of Malone. On March 4, 1925, the plaintiff served notice on Graham claiming title to the fixtures in the two stores and demanding possession thereof, which was refused and as a result two actions of replevin were instituted by the plaintiff, and the court, upon a hearing, found right to possession of the property to be in the plaintiff, and entered such judgment.

The defendants contend that the transaction between Thomas Malone and the plaintiff, while in form appearing to be a conditional sales contract, was in fact a chattel mortgage to secure the amount of money loaned by the plaintiff, and that [illegible] instruments were not recorded made them void as against the rights of the creditors who were in possession of the property through the assignee or trustee, and also as against the defendant A. Graham.

It is a well established doctrine of law in this state that where a bill of sale is given as security to provide for the payment of an account, it is held to be a chattel mortgage, and this was reiterated in a case entitled, The Southern Surety Company v. The People's State Bank of Astoria, 322 Ill., 307, where it is said:

"A bill of sale given as security to provide means of payment has been held to be a chattel mortgage. (Whittemore v. Fisher, 132 Ill. 243.) A bill of sale with a contemporaneous agreement to re-convey upon payment is a chattel mortgage. (Upham & Gordon v. Richey, 163 Ill. 530; Martin v. Duncan, 156 id. 274.) If this instrument had been acknowledged and recorded, as provided by statute, or if possession had been delivered to plaintiff in error at the time of its execution, there could be no question as to its validity as a chattel mortgage. The agreement conveyed legal title as security by language of bargain and sale, possession remaining with the transferer. The essence of a chattel mortgage is the intention to transfer title to secure the performance of an obligation by the mortgagor, and a transfer of title to secure a contingent liability is a valid chattel mortgage."

The reply of the plaintiff to this contention is that the property was in the possession of Falone by the provisions of a conditional sales contract, and that he did not have any title to the store fixtures in question at the time he turned over his business, as is claimed, to Graham, for the purpose of operating meat markets, and from the profits to pay the claims of the various creditors. It is the rule in this State that such contracts are recognized as valid contracts between the parties, and this is made so by the Uniform Sales Act, Sec. 25, Ch. 121a, par. 28, et seq. Ill. St. Bar Sts. 1935, which provides that where personal property is sold, delivery of the property may be made to the buyer and title reserved in the seller until the purchase price has been paid. Hixon v. Ward, 254 Ill. App. 505.

From the facts it is clear that Thomas Falone was in possession of these store fixtures as owner at the time the agreements described in this opinion were entered into between him and the plaintiff. There is no evidence that Falone delivered possession of the fixtures to the plaintiff except by symbolic delivery of the contracts that are a part of this litigation, and he continued to remain in possession after the execution of the bill of sale and the execution of a conditional sales contract by the plaintiff, which provided that Falone should remain in possession without title until he had made the payments required by the contract, when he would then retain title to the property.

"A bill of sale given as security to vendor for purchase price of payment has been held to be a chattel mortgage. (Whitesmore v. Tinker, 158 Ill. 264.) A bill of sale with a contemporaneous agreement to re-convey upon payment is a chattel mortgage. (Hobson & Gordon v. Tinker, 16[illegible] Ill. 330; Martin v. Duncan, 156 Id. 274.) If this instrument had been acknowledged and recorded, as provided by statute, [illegible] possession had been delivered to plaintiff as [illegible] at the time of its execution, there could be no question as to its validity as a chattel mortgage. The agreement conveyed legal title as security by lessee of warrin and sale, possession remaining with the transferor. The essence of a chattel mortgage is the intention to transfer title to secure the performance of an obligation by the mortgagor, and a transfer of title to secure a contract liability is a valid chattel mortgage."

The reply of the plaintiff to this contention is that the property was in the possession of Malone by the provisions of a conditional sales contract, and that he did not have any title to the store fixtures in question at the time he turned over the business as is claimed, to Graham, for the purpose of operating next morrow, and from the profits to pay the claims of the various creditors. It is the rule in this State that such contracts are recognized as valid contracts between the parties, and this is made so by the Uniform Sales Act, Sec. 25, Ch. 121a, par. 25, et seq. Ill. St. for 1935 which provides that where personal property is sold, delivery of the property may be made to the buyer and title assumed by the seller until the purchase price has been paid. Nixon v. Ward, 358 Ill. App. 505.

From the facts it is clear that [illegible] in possession of these store fixtures as owner at the time [illegible] described in this opinion were entered into between [illegible] the plaintiff. There is no evidence that Malone delivered possession of the fixtures to the plaintiff except by symbolic delivery [illegible] that are a part of this litigation, and be continued in possession after the execution of the bill of sale and the execution of a conditional sales contract by the plaintiff, which provided that Malone should remain in possession without title until he had made the payments required by the contract, when he would then receive

for the benefit of creditors is regarded as taking the same rights to the property transferred to him as the assignor had, but no greater, and concede that as between Falone and the West Suburban Finance & Thrift Company, the agreement of May 1, 1934, is valid, but while admitting that the contracts are good as between the parties, the defendants contend that there is an exception to the rule that where possession of property is taken by an assignee who holds it for the benefit of the creditors the right of the assignee is superior to the right of a mortgagee named in an unrecorded chattel mortgage, and rely on Sec. 1 of the Illinois Chattel Mortgage Act, which is:

> "No mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded (or filed) as hereinafter directed; and every such instrument shall, for the purposes of this Act, be deemed a chattel mortgage."

And further, the defendants rely on the case of Gubbins v. Equitable Trust Co., 80 Ill. App. 17, as having a bearing upon the contention above stated, that is, that the right of an assignee in possession for the benefit of creditors is superior to that of the holder of an unrecorded chattel mortgage. The court there said, in part:

> "Although the general proposition is that an assignee in insolvency for the benefit of creditors, stands only in the place of the assignor as respects the property of the latter, it would be anomalous if in the case of a chattel mortgage invalid as to creditors, it should be held to be valid as against the assignee who is a trustee for the creditors.
>
> As illustrated in the New York Court of Appeals decision, referred to in the Baker case, if the assignee takes no title against the mortgagee in such a case, it would follow that a creditor might, after the assignment, obtain judgment, have execution issued, and thus acquire a lien superior to both that of the mortgagee and assignee."

At the time Falone signed the purported contracts turning

for the benefit of creditors [illegible] to the property [illegible] greater, and concede [illegible] Southern Finance [illegible] 1906, is valid, but while admitting [illegible] the parties, the defendants contend that [illegible] the rule that where possession of property is taken by an assignee who holds it for the benefit of the creditors, the right of the assignee is superior to the right of a mortgagee in an unrecorded chattel mortgage, and rely on [illegible] Chattel Mortgage Act, which is:

> "No mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or security upon such property, shall be valid as against the rights and interests of any third person, [illegible] of shall be delivered to and remain with the mortgagee, or the [illegible] shall provide for the [illegible] to remain with the grantor, and be [illegible] and recorded (or filed) in [illegible] such instrument shall, for the purposes of this, be deemed a chattel mortgage."

And further, the defendants rely on the case of [illegible] v. [illegible] Trust Co., 60 Ill. App. 17, [illegible] above stated, that is, that the right of [illegible] for the benefit of creditors is superior to [illegible] an unrecorded chattel mortgage. The court there [illegible], in part:

> "Although the general proposition is [illegible] involvency for the benefit of creditors, [illegible] the place of the assignor, [illegible] latter, it would be [illegible] mortgage invalid as to creditors, [illegible] be valid as against the assignee [illegible] creditors.
>
> As illustrated in the New York [illegible] decision, referred to in the [illegible] take no title from the [illegible] would follow the [illegible] obtain judgment, have execution [illegible] a lien superior to both that of the mortgagee and assignee."

At the time Malone signed the mortgage contract for the

over the properties to Edward A. Graham, as trustee for the benefit of creditors, Falone was without title to the fixtures contained in the two stores in question, and these conditional sales contracts provide that ownership of and title to the described properties are to remain in the plaintiff until all of the indebtedness is paid in cash, and that thereupon title shall pass to Falone. The contracts being binding upon the former owner of the properties he, Falone, unquestionably, could not convey any better title than he had, and this fact was admitted by the defendants.

As stated before in this opinion, this form of contract is approved under the Uniform Sales Act, which was in effect prior to the transaction now under consideration. In the execution of the documents conveying title to the plaintiff and from the plaintiff to Falone, there were no representations made upon which the creditors relied to their damage, nor was the conduct of the plaintiff such as would preclude it from denying the seller's authority to convey. Upon this question our Supreme Court has laid down the rule, by which we believe this court should be governed, in the case of Sherer-Gillett Co. v. Long, 318 Ill. 432. The court said:

> "What representation has appellee made upon which appellant has relied to his damage? What conduct of appellee precludes it from denying the seller's authority to sell? It did not clothe Taylor with indicia of title. Clothing another person with indicia of ownership does not mean simply giving him possession of a chattel. Possession is one of the indications of title, but possession may be delivered by the owner to a lessee, a bailee, an agent or a servant. Owners of chattels must frequently entrust others with their possession, and the affairs of men could not be conducted unless they could do so with safety, so long as the possession of the chattel is not accompanied by some indicium of ownership or the right to sell. (Drain v. La Grange State Bank, supra.)"

And the court then said:

> "The Uniform Sales act recognizes the validity of such contracts and specifically provides that no title can be passed by the purchaser of goods under such a contract

over the properties to Kamrad [illegible], [illegible] for the benefit of creditors, Falone was without title to the properties [illegible] in the two stores in question, and those [illegible] provide that ownership of and title to the [illegible] properties are to remain in the plaintiff until all of the indebtedness [illegible] in cash, and that thereupon title shall pass to Falone. The contracts being signing upon the former owner of the properties as, Falone, unquestionably, could not convey any better title than he [illegible], and this fact was admitted by the defendant.

As stated before in this opinion, this form of contract is approved under the Uniform Sales Act, [illegible] in effect prior to the transaction now under consideration. In the execution of the documents conveying title to the plaintiff and from the plaintiff to Falone, there were no representations [illegible] creditors relied to their damage, nor was the [illegible] of the plaintiff such as would preclude it from denying the [illegible] authority. However, Upon this question our [illegible] have laid down the rule, by which we believe this court should be governed, [illegible]

Shearer-Gillett Co. v. Jones, 212 [illegible]

> "What representation has plaintiff made [illegible] creditor has relied to his damage? Not one of the [illegible] includes it from denying the validity to sell? It did not advise Taylor with [illegible] [illegible] another person with [illegible] [illegible] giving him possession of [illegible]. [illegible] indications of title, but possession may [illegible] the owner to [illegible], [illegible] owners of chattels must frequently [illegible] possession, and the affairs of men [illegible] unless they could do so with safety, so long as the possession of the chattel is not [illegible] [illegible] or the right to sell. (Or in [illegible] supra.)"

And the court then said:

> "The Uniform Sales Act recognizes the validity of such contracts and specifically provides that no title can be passed by the purchaser of goods under such contract

'unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.' There is no basis for the operation of an estoppel in this record."

In the instant case there is nothing in the record which would indicate that the plaintiff is estopped from asserting its right to the chattels recovered in this replevin suit from the defendant, who was in possession.

The conclusions we have reached in the instant case would apply to the claim of R. Clark, who makes the point that he was a purchaser for value and without notice of plaintiff's claim, upon the theory that the contract between the plaintiff and Falone was but a chattel mortgage, and not being recorded, is void as to Clark.

Although there is some question as to proof offered by Clark of the purchase of the store fixtures, and it is not altogether clear just how the transaction was negotiated, it will not be necessary to go into the details of the alleged purchase. In the transaction, however, Graham could transfer the chattels only with such title as Falone was able to give, and Falone not having title to the fixtures could not transfer the chattels.

For the reasons stated in this opinion, the judgments of the Municipal Court are affirmed.

JUDGMENTS AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

'unless the owner of the goods is [illegible] a [illegible] precluded from denying the seller's [illegible] title.'
There is no basis for the operation of [illegible] in this record."

In the instant case there is nothing in the record which would indicate that the initial [illegible] transferring its right to the chattels recovered in the replevin suit from the defendant, who was in possession.

The conclusions we have reached in the instant case would apply to the claim of [illegible] Clark, who makes the [illegible] a purchaser for value and without notice of plaintiff's claim, upon the theory that the contract between the plaintiff and [illegible] was but a chattel mortgage, and not being recorded, is void as to Clark.

Although there is some question as to proof offered by Clark of the purchase of the stove fixtures, and it is not altogether clear just how the transaction was negotiated, it will not be necessary to go into the details of the alleged purchase. In the transaction, however, Graham could transfer the chattels only with such title as Malone was able to give, and Malone had nothing title to the fixtures could not transfer the chattels.

For the reasons stated in this opinion, the judgments of the Municipal Court are affirmed.

JUDGMENTS AFFIRMED.

HALE, P.J. AND DENIS E. SULLIVAN, J., CONCUR.

38381

WEST SUBURBAN FINANCE & THRIFT COMPANY, a corporation,
Appellee,
v.
EDWARD A. GRAHAM, JOHN DOE, and MARY ROE,
Appellants.

Consolidated with -

WEST SUBURBAN FINANCE AND THRIFT COMPANY, a corporation,
Appellee,
v.
EDWARD A. GRAHAM, R. CLARK, JOHN DOE, and MARY ROE,
Appellants.

APPEALS FROM

MUNICIPAL COURT

OF CHICAGO.

285 I.A. 587

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by R. Clark from a judgment entered in the Municipal Court of Chicago in an action of replevin instituted by the West Suburban Finance & Thrift Company, a corporation, against him, and the court, at the conclusion of the hearing, found the right to possession of the chattels described in the replevin writ to be in the plaintiff, and entered judgment upon such finding.

What we have said in our opinion in Case No. 38380, with which this proceeding was consolidated for the purpose of a hearing, is controlling upon the questions called to our attention by this defendant, and for the reasons stated in that opinion, the judgment entered in the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

28381

WEST SUBURBAN FINANCE & TRUST COMPANY, a corporation, Appellee, v. EDWARD A. GRAHAM, JOHN DOE, and MARY ROE, Appellants.	

Consolidated with —

WEST SUBURBAN FINANCE AND TRUST CO. [illegible] Y, a corporation, Appellee, v. EDWARD A. GRAHAM, [illegible] A. GRAHAM, JOHN DOE, and MARY ROE, Appellants.	

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This is an appeal by E. [illegible] from a judgment entered in the Municipal Court of Chicago in an action [illegible] in ejectment instituted by the West Suburban Finance & Trust Company, [illegible] to recover possession, against him, and the court, at the conclusion of the [illegible], found the right to possession of the premises described in the pleadings with to be in the plaintiff, and entered judgment [illegible] therefor.

What we have said in our opinion in [illegible] v. [illegible], 1920, with which this proceeding was consolidated [illegible] of hearing, is controlling upon the questions raised [illegible] by this defendant, and for the reasons [illegible], the judgment entered in the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALE, P.J., AND [illegible], J., [illegible].

38420

SOUTH SHORE SECURITIES CO., a corporation, Appellee, v. JOHN E. NEWBERG, et al. Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

50

285 I.A. 587

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On May 23, 1932, plaintiff caused a judgment by confession to be entered for the sum of $4,516.71 against the defendants, afterwards confirmed by the court upon a hearing. From this judgment the defendants appeal.

The declaration filed by plaintiff alleges that the defendants for valuable consideration had delivered to the plaintiff a certain instrument of guaranty, whereby defendants guaranteed the full payment of a promissory note for $4,900, signed by one Margaret J. Davis, and secured by a junior mortgage upon the property therein described.

On July 11, 1932, defendants filed their petition to open and vacate the judgment, and on July 14, 1932, Judge Lynch opened the said judgment, with leave to plead. On December 3, 1934, the cause was reached on the call, and the court entered an order that the judgment be vacated and set aside on ex parte motion. This order of December 3d was vacated on December 4, 1934.

It appears from the record that plaintiff had loaned to the Charles Ringer Company $3900 on a note signed by Margaret J. Davis, secured by a junior mortgage on property not here in question, and upon a guaranty of said note by defendants. The defendant John E. Newberg was in the business of contracting for the construction of buildings. In July, 1928, he was approached by Elmer Johnson,

38420

SOUTH SHORE ACQUAINTANCE CO., a corporation,	[illegible]
Appellee,	[illegible]
v.	
JOHN E. KEMPBERG, et al.,	[illegible]
Appellants.	

SPECIAL DEBT

MR. JUSTICE [illegible] delivered the opinion of the court.

On May 28, 1952, plaintiff [illegible] judgment by confession to be entered for the sum of $4,310.71 against the defendants, afterwards confirmed by the court [illegible] from this judgment the defendants appeal.

The declaration filed by plaintiff alleges that the defendants for valuable consideration [illegible] delivered to the plaintiff a certain instrument of guaranty, whereby defendants guaranteed the full payment of a promissory note for $4,300, signed by one Margaret L. Davis, and secured by a junior mortgage upon the property therein described.

On July 11, 1952, defendants filed their petition to open and vacate the judgment, and on July 14, 1953, Judge [illegible] opened the said judgment, with leave to plead. On December 3, 1954, the cause was reached on the call, and the court entered an order that the judgment be vacated and set aside on ex parte motion. This order of December 3d was vacated on December [illegible], 1954.

It appears from the record that [illegible] to the Charles Ringer Company $5900 on a note signed by a [illegible] Davis, secured by a junior mortgage on property [illegible] and upon a guaranty of said note by defendants. The defendant John E. Kempberg was in the business of [illegible] for the construction of buildings. In July, 1952, he was [illegible] by Ginter Johnson

an agent for the Charles Ringer Company, a real estate firm, and told about the lot in question. The defendant examined thelot, which was priced to him at $5500, and shortly thereafter advised Johnson he would buy the lot for $5500 if the owner would accept a second mortgage note signed by Margaret J. Davis, on which there remained due the sum of $4,900, as part payment. Later Johnson advised the defendant that the owner would accept his proposition and asked him to call at the office of the Charles Ringer Company for the purpose of signing the contract of purchase. The contract was signed by the defendants, and provided that Lawrence Mills would sell the lot for $5500 and accept the $4,900 Davis note, secured by a second mortgage, as part payment thereof by the defendants.

The defendants paid $200 earnest money to the Charles Ringer Company. Later the Ringer Company notified defendant Newberg that title to the lot had been brought down and was good, and requested him to close the deal. On August 28, 1928, defendants paid the additional sum of $400 and delivered the Davis note for $4,900, together with the trust deed, to the Charles Ringer Company, and were informed by the Company that it would record the deed.

The Charles Ringer Company deposited the Newberg check for $400 in the bank and received credit for the amount, and two days thereafter, on August 30, 1928, Elmer Johnson, the agent acting for the Ringer Company in the real estate transaction, called at defendants' home and requested the defendants to sign a guaranty of the Davis note. Defendant Newberg stated at the time he did not like to sign such paper, and Elmer Johnson explained that the Charles Ringer Company had acquired the Davis note and mortgage, and desired to borrow money on it from the South Shore Securities Company. Johnson also stated that plaintiff in the instant case was a member of the Charles Ringer organization, and that "It will look better

an agent for the Charles Hinger Company, a real estate firm, and told about the lot in question. The defendant examined the lot, which was priced to him at $5500, and shortly thereafter advised Johnson he would buy the lot for $5500 if the owner would accept a second mortgage note signed by Margaret G. Davis, on which there remained due the sum of $4,900, as part payment. Later Johnson advised the defendant that the owner would accept his proposition and asked him to call at the office of the Charles Hinger Company for the purpose of signing the contract of purchase. The contract was signed by the defendants, and provided that Lawrence Mills would sell the lot for $5500 and accept the $4,900 Davis note, secured by a second mortgage, as part pay ent thereof by the defendants.

The defendants paid $500 earnest money to the Charles Hinger Company. Later the Hinger Company notified defendant Newberg that title to the lot had been brought down and was good, and requested him to close the deal. On August 28, 1928, defendants paid the additional sum of $400 and delivered the Davis note for $4,900, together with the trust deed, to the Charles Hinger Company, and were informed by the Company that it would record the deed.

The Charles Hinger Company deposited the Newberg check for $400 in the bank and received credit for the amount, and two days thereafter, on August 30, 1928, Elmer Johnson, the agent acting for the Hinger Company in the real estate transaction, called at defendants' home and requested the defendants to sign a guaranty of the Davis note. Defendant Newberg stated at the time he did not like to sign such paper, and Elmer Johnson explained that the Charles Hinger Company had acquired the Davis note and mortgage, and desired to borrow money on it from the South Shore Securities Company Johnson also stated that plaintiff in the instant case was a member of the Charles Hinger organization, and that "it will look better

if you sign the guaranty, and you don't have to be afraid, because you are not getting anything for it and you don't have to pay anything." Thereupon the defendants signed the guaranty in question. At the time of signing the guaranty, a letter was signed by the defendants authorizing the plaintiff to recognize the Charles Ringer Company as the owner of the Davis note, and certifying the amount still due thereon.

From the record it does not appear that plaintiff offered any evidence except admission by the plaintiff of the execution of the guaranty, which the court considered, but upon what theory the amount of the judgment was fixed, is not clear from the record.

The principal point made by the defendants is that the court held, as a matter of law, it was necessary that the signed guaranty be based upon a consideration. While there is no evidence of any consideration received by the defendants when the guaranty was signed, there is evidence that the contract for the purchase of the lot had already been signed and cash paid, together with delivery of the Davis note secured by a trust deed to the Charles Ringer Company before the signing of the guaranty by the defendants. There is some evidence that the Charles Ringer Company and the plaintiff company were controlled by the same stockholders, and that the officers were members of both organizations. From the record it is clear that Johnson, the agent who appeared for the Charles Ringer Company, acted for this company and was instrumental in negotiating the sale of the lot to the defendants and in inducing the defendants to sign the guaranty. The record also shows that Johnson was an officer and a member of the plaintiff organization.

if you sign the guaranty, and you don't have to be afraid, because you are not getting anything for it and you don't have to pay anything." Thereupon the defendants signed the guaranty in question. At the time of signing the guaranty, a letter was signed by the defendants authorizing the plaintiff to recognize the Charles Ringer Company as the owner of the Davis note, and certifying the amount still due thereon.

From the record it does not appear that plaintiff offered any evidence except admission by the plaintiff of the execution of the guaranty, which the court considered, but upon what theory the amount of the judgment was fixed, is not clear from the record.

The principal point made by the defendants is that the court held, as a matter of law, it was necessary that the signed guaranty be based upon a consideration. While there is no evidence of any consideration received by the defendants when the guaranty was signed, there is evidence that the contract for the purchase of the lot had already been signed and cash paid, together with delivery of the Davis note secured by a trust deed to the Charles Ringer Company before the signing of the guaranty by the defendants. There is some evidence that the Charles Ringer Company and the plaintiff company were controlled by the same stockholders, and that the officers were members of both organizations. From the record it is clear that Johnson, the agent who appeared for the Charles Ringer Company, acted for this company and was instrumental in negotiating the sale of the lot to the defendants and in inducing the defendants to sign the guaranty. The record also shows that Johnson was an officer and a member of the plaintiff organization.

The general rule of law, supported by the authorities, is that where an accommodation guaranty is issued without consideration, no recovery can be had thereon by the original payee against an accommodation maker, unless upon a consideration. Keenan v. Blue, 240 Ill. 177.

For the reasons stated, the evidence does not justify the entry of the judgment in this proceeding. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

The general rule of law, supported by the authorities, is that where an accommodation endorsity is issued without consideration, no recovery can be had thereon by the original payee against an accommodation maker, unless upon a consideration. Keenan v. Blue, 260 Ill. 177.

For the reasons stated, the evidence does not justify the entry of the judgment in this proceeding. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

38537

ANTHONY BALCUNAS and ELEANOR BALCUNAS,
Appellants,

v.

ANNA ZEBAS, ANGELA ELIJOSIUS and RAFALAS ELIJOSIUS,
Appellees.

APPEAL FRO

MUNICIPAL

OF CHICAGO.

285 I.A. 588

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

In this action instituted by the plaintiffs in the Municipal Court of Chicago, a trial was had before the court without a jury and a judgment entered finding the issues against the plaintiffs, from which judgment the plaintiffs appeal.

Plaintiffs' statement of claim is based upon a contract under seal entered into by both the plaintiffs and the defendants on January 28, 1933, wherein the defendants, described as parties of the second part, claim to have an interest in certain insurance policies in possession of the plaintiffs, who are described as the parties of the first part, which policies were issued upon the life of one William Elijosius, who died on or about January 21, 1933. The policies were made payable to his estate.

From this contract it appears that the defendants are the next of kin of the deceased, who left no surviving wife or children, or other heirs or next of kin entitled to share in the proceeds of the policies; that the plaintiffs hold certain policies on the life of the deceased aggregating

38637

[illegible]
[illegible]

[illegible],

[illegible]

v.

[illegible]
[illegible] INC. INC.

[illegible].

[illegible]

COURT.

[illegible] Institute

[illegible]

[illegible] court without a jury [illegible]

[illegible] the [illegible]

appeal.

[illegible]

contract under seal [illegible]

the defendants on [illegible]

described as [illegible]

interest in cert [illegible]

plaintiffs, who [illegible]

part, which [illegible]

Ritchie, who [illegible]

[illegible] made [illegible]

[illegible]

[illegible] the [illegible]

[illegible] or [illegible]

[illegible] in the [illegible]

hold certain [illegible]

the sum of $3,642, and claim that they have been put to expense in furnishing medical aid to the deceased, and have also incurred liability for funeral costs, services and arrangements in connection with the burial of the deceased. By reason of these negotiations, the contract in question was prepared by the attorney, who appeared for the defendants at the time the negotiations were had, and it was agreed between the parties that the plaintiffs were to receive from the proceeds of the policies in their possession the sum of $900 in full settlement of all costs incurred in caring for the deceased during hislast illness and for reimbursements for all funeral costs and expenses, and that there was to be deducted from this sum $150 to be paid to the defendants for the purchase of a cemetery lot and the erection of a tombstone upon the grave of the deceased; that the remainder of the proceeds collected from the insurance companies was to be equally divided between the plaintiffs, as parties of the first part, and the defendants, as parties of the second part, after certain deductions were allowed. The plaintiffs claim the sum of $1,360.77.

The defendants by their affidavit of merits deny that plaintiffs are entitled to recover, for the reason that the defendant Angela Elijosius was induced to sign the alleged contract attached to plaintiffs' statement of claim by fraudulent representations made to her by the plaintiffs; that they represented that the deceased, William Elijosius, left a will giving all of the property to Eleanor Balcunas, one of the plaintiffs, and that the representation was false, and known by the plaintiffs to be false; that the deceased William Elijosius died intestate, and that the statements

the sum of $[illegible], and [illegible] for [illegible]
expenses in [illegible] work [illegible]
also insurance liability for [illegible]
m nts in connection with the [illegible]
reason of [illegible]
property by the attorney, [illegible]
the time the negotiation [illegible]
the policies [illegible]
cents of the policies in the possession [illegible]
in full satisfaction of all [illegible]
deceased owning at least [illegible]
all funeral [illegible]
deducted from the sum [illegible]
for the purchase of a cemetery [illegible]
tombstone upon [illegible]
of the proceeds collected from [illegible]
to be equally divided between [illegible]
the first part, and the [illegible]
part, at or cost in [illegible]
claim the sum of $[illegible].77.

The defendant [illegible]
that plaintiff [illegible]
defendant [illegible]
contract attached to [illegible]
lent representations [illegible]
represented that the [illegible]
will giving all of the property [illegible]
the plaintiffs, and that the representations [illegible]
known by the plaintiffs to be false; [illegible]
William Tipping [illegible]

made by the plaintiffs were for the purpose of defrauding the defendants.

From the evidence it appears that for sometime prior to January 21, 1933, William Elijosius, a bachelor, had occupied a room in the premises at 663 West 14th Place owned by the plaintiff, Anthony Balcunas; that plaintiff had advanced money on loans, for premiums on several small industrial insurance policies and also for his maintenance; that both of the plaintiffs were fellow countrymen of William Elijosius and had befriended him in their home, and on April 11, 1932, Elijosius executed a will bequeathing to Mrs. Balcunas all his property - "including all the insurance money on policies in force at the time of my death * * * for her kind acts for many years while I was out of employment, in furnishing me, without compensation, board, lodging and other necessities of life including payment on insurance premiums."

Upon the death of the insured the plaintiffs had in their possession insurance policies, which were in force and payable to insured's estate, and sums collected as follows:

Policy No.	Insurance Company	Amount of Policy	Amount Collected	Collected By Administrator
7564054	Western & Southern	$295	$990.27	
6083512	" "	660		
9126037	" "	500	50.96	Plaintiffs
9308560	" "	98		
109612337	Metropolitan	336		
110705615	"	288	626.88	Administrator
6765554	American National	245	87.50	Mrs. Zebas
6765553	" "	294	87.50	Plaintiffs
6131945	Mutual Life	464.	336.00	Administrator
86094643	Prudential Life	500	502.50	Anna Zebas
		$3,680.	$2,681.61	

made by the plaintiff [illegible] for the [illegible] of defending the def ndants.

From the evidence [illegible] prior to January 21, 1932, [illegible], [illegible], occupied a room in [illegible] by the plaintiff, [illegible] advanced money on loans, [illegible] trial insurance policies [illegible] both of the plaintiffs were [illegible] Hilfoslus and had [illegible] on April 11, 1932, [illegible] Mrs. Blounas all [illegible] money on collateral [illegible] for her kind [illegible] in furnishing [illegible] necessities of life [illegible]."

Upon the death of the [illegible] their possession [illegible] payable to insured's estate, [illegible]:

Policy No.	Insurance company	Amount of policy	Amount collected	Amount collected by [illegible]
7564053	Western [illegible]	[illegible]	[illegible]	
6083512	"	250		
9126037	"	[illegible]		
9208560	"	[illegible]		
1088125327	Metropolitan	[illegible]		
1107058125	"	[illegible]		
8725554	American National	[illegible]	[illegible]	[illegible]
8725553	"	254	[illegible]	
8181845	Mutual Life	[illegible]	[illegible]	
8808484	Prudential Life	[illegible]	[illegible]	
		[illegible]	[illegible]	

There were also two other policies aggregating $700 or $800, issued by the John Hancock Life Insurance Company wherein the plaintiff Anthony Balcunas was named as beneficiary.

When the insured died on January 21, 1933, the plaintiffs notified Anna Zebas, sister of the deceased, of his death, arranged for his funeral and assumed the burial expenses of $530.50.

It appears from the evidence that a controversy arose between the plaintiffs and the defendants about the insurance proceeds, whereupon the plaintiff Anthony Balcunas offered to surrender the policies he held payable to the estate, if the relatives would pay the funeral bills and indebtedness of Elijosius to him. As a result of this offer, the parties met on January 28, 1933, at the office of defendants' attorney who prepared the above mentioned contract, which was signed by the plaintiffs and also by Anna Zebas and Angela Elijosius, sisters of the deceased, and his brother, Rafalas Elijosius. Thereupon, under the terms of the contract, the plaintiffs surrendered possession of the insurance policies aggregating approximately $3,642, upon which collections were made by the plaintiffs and the defendants amounting to approximately $2,681.61. Subsequent to the date of the agreement the defendant, Mrs. Anna Zebas, the only relative of the deceased residing in Illinois, had her son John Zebas appointed administrator of the estate.

During the trial of the case, the last will and testament of William Elijosius was filed by the plaintiffs' attorney with the Clerk of the Probate Court of Cook County, and from the record it appears that the plaintiffs asserted their rights under the contract signed by the parties, and the defendants having collected the proceeds of the policies refused to pay to

There was also two other policies [illegible] $700 or $800, issued by the John G. Mock Life Insurance Company wherein the plaintiff authority [illegible] beneficiary.

When the insured died on January 31, 1932, the plaintiffs notified one Cobbs, at his [illegible] of his death, arranged for the funeral and paid the burial expenses of $230.80.

It appears from the evidence that a controversy arose between the plaintiffs and the defendant [illegible] insurance proceeds, whereupon the plaintiffs [illegible] offered to surrender the policies be paid only in the [illegible] if the relatives would pay the funeral bill [illegible] of William Lipscomb to him. As a result of this [illegible] met on January 28, 1933, at the office of defendant's attorney who prepared the above mentioned contract, [illegible] signed by the plaintiffs and also by some [illegible] William Lipscomb, sisters of the deceased, and his brothers, [illegible] Lipscomb. Thereupon, under the terms of the contract, the [illegible] surrendered possession of and in [illegible] approximately $3,000, upon which [illegible] the plaintiffs and the defendants [illegible] $1,851.61 subsequent to the date of the [illegible] Cobbs, the only [illegible] the deceased [illegible] William [illegible] had for son John Cobbs [illegible] the [illegible].

During the trial of [illegible], the [illegible] of William Lipscomb was filed by the [illegible] attorney with the Clerk of the Probate Court of [illegible], [illegible] record it answers that the [illegible] under the contract signed by the [illegible], [illegible] having collected the proceeds of the policies refused to pay to

the plaintiffs the amount due them under its terms.

From an examination of the last will and testament of William Elijosius it appears that the plaintiff Eleanor Balcunas, as legatee, was to receive all of the testator's property, which included all the insurance money coming due on the life insurance policies at the time of testator's death, and from the will it is evident why the testator made this plaintiff the sole legatee.

It is apparent from the facts as herein stated that a controversy arose between the parties and upon coming to an agreement the contract which is now the subject of this litigation was entered into upon sufficient consideration. Under this contract the plaintiff Eleanor Balcunas waived her right as the sole legatee under the will of the testator, and Anthony Balcunas released his claim as the holder of a note and was relieved of his obligation to pay the burial expenses of the deceased amounting to $530.50

In signing this contract the defendants acted upon advice of counsel, who not only prepared the contract, but also advised the defendants in regard to their rights, and as a result the controverted claims of the respective parties were settled and this contract was entered into.

The courts encourage the adjustment of controversies of this character, and in the case of Tipanovich v. Sleeth, 349 Ill. 98, the Supreme Court upon a like question said:

"Courts of equity favor the settlement of disputes among members of a family by agreement rather than by resort to law, and the validity of such contracts has been repeatedly recognized by this court. (Cole v. Cole, 392 Ill. 154.) The master and chancellor were well warranted in finding that the agreement here involved was free from fraud or misrepresentation. We see no sufficient basis for acceding to

the plaintiffs the [illegible] due them under [illegible].

From a [illegible] of [illegible] of "Willow Hillpotato" [illegible] bolumne, or legatee, [illegible] property, which included [illegible] on the life insurance [illegible] death, and from the will [illegible] this plaintiff was sole legatee.

It is apparent [illegible] a controversy arose [illegible] agreement the contract [illegible] gation was entered into upon [illegible]. Under this contract the plaintiff [illegible] as the sole legatee under a [illegible] bolumne retained his [illegible] relieved of his obligation [illegible] assumed [illegible].

In giving [illegible] advice of counsel, who [illegible] advised the defendants [illegible] result the contracted [illegible] settled and this court [illegible].

The courts discovery [illegible] of this character, and in the case of _Ellingsworth v. [illegible]_, [illegible] Ill. 56, the supreme court upon a [illegible] ruled:

> "Courts of equity [illegible] members of a family by agreement [illegible] law, and the validity of such [illegible] recognized by this court. (Cole v. [illegible], 158 Ill. 164.) The master and chancellor [illegible] the agreement here involved [illegible] reconstruction. [illegible]

Mrs. Sleeth's contention that there was present a fiduciary relationship between her and the others who were concerned in its making. (VanGundy v. Steele, 261 Ill. 206; Bishop v. Hilliard, 227 id. 382.) No ambiguity is apparent in its terms and unless there is ambiguity in the language of a contract the meaning must be determined from the words used and from no other source. (Englestein v. Mintz, 345 Ill.48.)"

From the record we find that the contract was based upon a sufficient consideration and understood by the parties at the time it was signed, and there is no indication that the defendants were induced by means of fraud or misrepresentation to enter into the contract upon which plaintiffs' action is based.

The problem confronting this court is whether the contract entered into between the plaintiffs and the defendants is an enforceable one. From the record it appears the trial court after hearing the evidence reached the conclusion that the contract between the parties was not enforceable.

Family settlements by agreement, when fair and obtained without fraud have been repeatedly approved by the courts. Stipanowich v. Sleeth, 349 Ill. 98; Wolf v. Uhlemann, 325 Ill. 165.

While this case is not what might be termed a family settlement, still the plaintiffs have a certain interest in the policies of insurance because of the will making the plaintiff Eleanor Balcunas the sole legatee under its terms, and the fact that the other plaintiff, Anthony Balcunas, her husband, assumed certain obligations in the payment of funeral expenses, as well as the payment of a note for $500 which he held against the estate, By reason of these facts the parties were justified in entering into the contract in question.

The will executed by the deceased in his lifetime is

Mrs. Hagerty's contention [illegible] that by relationship between [illegible] contract in the action. (Vandenhoff v. [illegible] 1. 2d 1, 2d 1. 2d: [illegible] v. [illegible] 1d. 327 id. 382.) [illegible] contract and unless there is [illegible] the [illegible] contract the measure must be [illegible] from no other source. ([illegible] v. [illegible], 142 [illegible] 1. 4d.)"

From the record [illegible] upon a sufficient [illegible] at the time it was [illegible] defendants were [illegible] to enter into the contract [illegible] based.

The problem confronting [illegible] contract entered into between [illegible] dants is an enforceable one. [illegible] the trial court after [illegible] clusion that the contract [illegible] forceable.

Family settlements [illegible] tained without fraud [illegible] Fitzgerald v. [illegible] III. 188.

While there is [illegible] family settlement, still the [illegible] in the policies of [illegible] plaintiff Eleanor [illegible] and the fact that [illegible] husband, [illegible] expenses, as well as the payment of [illegible] hold against the estate. The [illegible] were justified in entering into the contract.

The will executed by the decedent in [illegible] is

on file with the Clerk of the Probate Court and subject to such proceedings as may be deemed necessary by anyone having an interest in the estate, but this would not prevent the parties, having certain rights to property, as well as claims, from entering into a contract to make adjustments, and it has always been the aim of the courts to encourage a fair settlement of a controversy between parties.

Although we are of the opinion that the court erred in finding the issues for the defendants, we regret that they failed to appear and give their views upon the various questions raised upon this appeal. However, we believe it only fair that a retrial be had, and for the reasons expressed herein, the judgment is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P. J. AND
DENIS E. SULLIVAN, J. CONCUR.

on file with the Clerk of the [illegible] to such proceeding, as may [illegible] interest in the estate, [illegible] having certain rights to [illegible] entering into a contract to make [illegible] been the aim of the courts to [illegible] a controversy between parties.

Although we are of the opinion that the court erred in finding the issues for the defendants, [illegible] they failed to answer and give their [illegible] raised upon this appeal. However, [illegible] that a retrial be had, and for the [illegible] the judgment is reversed and the cause is remanded.

JUDGMENT [illegible].

HALL, P. J. AND
DENIS E. DE LIMAK, J. CONCUR.

38286

STANLEY WERDELL,
Appellee,

v.

WALTER RECZEK and KATARZYNA RECZEK, his wife,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

52

285 I.A. 588

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

This is an appeal from a judgment entered in the Municipal Court in favor of the plaintiff Stanley Werdell and against the defendants Walter Reczek and Katarzyna Reczek, his wife, in the sum of $308 as attorney's fees claimed to be due and owing to the plaintiff for services rendered for the defendants.

The plaintiff set forth the services he rendered for the defendants in his statement of claim, alleging that he had been retained by them on August 22, 1934, to represent them in the matter of a default by them in the payment of interest on a note secured by a trust deed in the principal sum of $13,000; that he arranged a settlement of the entire indebtedness for $9,900 in Home Owners Loan Corporation bonds, and $3,100 in cash to be paid the owner of the note and trust deed; that he received $50 on account of his retainer, and spent $5.00 in filing an appearance for the defendants in the foreclosure suit instituted by the owner of said trust deed and principal note. Accompanying the statement of claim and made a part thereof was a schedule of the time spent by the plaintiff in doing this work, beginning with August 22, 1934 and ending on October 22, 1934. The plaintiff contends that after he had made the arrangements for said settlement of the indebtedness, the defendants retained another lawyer to close the transaction with-

38886

STANLEY WERONSKI, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
WALTER HOCZEK and KATARZYNA HOCZEK, his wife, Appellants.	

28 I.A. 588

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

This is an appeal from a judgment entered in the Municipal Court in favor of the plaintiff Stanley Weroski and against the defendants Walter Hoczek and Katarzyna Hoczek, his wife, in the sum of $308 as attorney's fees claimed to be due and owing to the plaintiff for services rendered to the defendants.

The plaintiff set forth the services he rendered for the defendants in his statement of claim, alleging that he had been retained by them on August 22, 1934, to represent them in the matter of a default by them in the payment of interest on a note secured by a trust deed to the principal sum of $12,000; that he arranged a settlement of the entire indebtedness for $3,300 in Home Owners Loan Corporation bonds, the $3,100 to be paid in cash to the owner of the note and trust deed; that he received $30 on account of his retainer, and spent $5.00 in filing an appearance for the defendants in the foreclosure suit instituted by the owner of said trust deed and principal note. Accompanying the statement of claim and made a part thereof was a schedule of the time spent by the plaintiff in doing this work, beginning with August 22, 1934 and ending on October 22, 1934. The plaintiff contends that after he had made the arrangements for said settlement of the indebtedness, the defendants retained another lawyer to close the transaction with-

out first paying the plaintiff for his services; that the fair, usual and customary fee for such services is $300.

The plaintiff further claims there is a balance of $8.00 due to him from the defendant Walter Reczek only for certain legal services performed for the said defendant.

At the same time plaintiff filed his suit, he also filed an affidavit for an attachment in aid in pursuance of which an attachment writ issued against the Chicago Title and Trust Company, as garnishee, and that said garnishee filed its answer of "No Funds".

The defendants filed their appearance and made a demand for a trial by a jury of six men and filed an affidavit of merits which was later stricken on motion of plaintiff and subsequently filed their amended affidavit of merits which was likewise stricken. Defendants finally filed their second amended affidavit of merits on which, on motion of the plaintiff, was stricken and judgment against the defendants was entered in the sum of $308 and costs, and the attachment sustained. The second amended affidavit of merits answered the paragraphs of the statement of claim seriatim .

Defendants deny, among other things, that plaintiff was retained for the purpose of aiding defendants in procuring a loan; deny that plaintiff rendered legal services set out in plaintiff's statement of claim; deny plaintiff spent the time set forth in the plaintiff's schedule of services; deny that a settlement of said claim was actually effected in the claim against the defendants on the mortgage and asserts that it was necessary to engage another attorney to close said transaction.

Defendants further assert that pursuant to an Act of Congress creating the Homer Owners Loan Corporation, that no attorney should receive more than $10 for aiding an applicant to secure

out first paying the plaintiff for his services; that the fair, usual and customary fee for such services is $750.

The plaintiff further claims there is a balance of $8.00 due to him from the defendant either based only for certain legal services performed for the said defendant.

At the same time plaintiff filed his suit, he also filed an affidavit for an attachment in aid in pursuance of which an attachment writ issued against the Chicago Title and Trust Company as garnishee, and that said garnishee filed its answer of "No Funds".

The defendants filed their appearance and made a demand for a trial by a jury of six men and filed an affidavit of merits which was later stricken on motion of plaintiff and subsequently filed their amended affidavit of merits which was likewise stricken. Defendants finally filed their second amended affidavit of merits on which, on motion of the plaintiff, was stricken and judgment against the defendants was entered in the sum of $808 and costs, and the attachment sustained. The second amended affidavit of merits answered the paragraphs of the statement of claim specifically.

Defendants deny, among other things, that plaintiff was retained for the purpose of aiding defendants in procuring a loan; deny that plaintiff rendered legal services set out in plaintiff's statement of claim; deny plaintiff spent the time set forth in the plaintiff's schedule of services; deny that a settlement of said claim was actually effected in the claim against the defendants on the mortgage and assert that it was necessary to engage another attorney to close said transaction.

Defendants further assert that pursuant to an Act of Congress creating the Home Owners Loan Corporation, that no attorney-[illegible]

a loan in the Home Owners Loan Corporation, which was the purpose for which the plaintiff was engaged and that the plaintiff had been paid the sum of $50. Defendants further deny that the usual and customary fee for such services is $300.

We think the affidavit of defense stated sufficient to create issues which entitled defendants to a hearing before a jury, and the court erred in striking the second amended affidavit of merits.

It is further claimed that the summons in the attachment in aid was not served upon the defendants, but only upon the garnishee who answered "No Funds".

Inasmuch as no evidence was heard, we fail to see on what basis the attachment was sustained.

For the reasons herein given, the judgment of the Municipal Court against Walter Reczek and Katarzyna Reczek, his wife, is hereby reversed and the writ of attachment against the Chicago Title and Trust Company is hereby quashed and the cause is remanded for a new trial.

JUDGMENT REVERSED, WRIT QUASHED AND CAUSE REMANDED.

HALL, P.J. AND HEBEL, J. CONCUR.

a loan in the Home Owners Loan Corporation, which was the purpose for which the plaintiff was engaged and that the plaintiff had been paid the sum of $50. Defendants further deny that the usual and customary fee for such services is $500.

We think the affidavit of defense stated sufficient to create issues which entitled defendants to a hearing before a jury, and the court erred in striking the second amended affidavit of merits.

It is further claimed that the summons in the attachment in aid was not served upon the defendants, but only upon the garnishee who answered "No Funds".

Inasmuch as no evidence was heard, we fail to see on what basis the attachment was sustained.

For the reasons herein given, the judgment of the Municipal Court against Walter Kocek and Katarzyna Kocek, his wife, is hereby reversed and the writ of attachment against the Chicago Title and Trust Company is hereby quashed and the cause is remanded for a new trial.

JUDGMENT REVERSED, WRIT QUASHED AND CAUSE REMANDED.

HALL, P.J. AND ISRAEL, J. CONCUR.

285 Ill. App. 53

38392

JOHN W. KEOGH, Appellee, v. E. J. MILLSPAUGH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 588[3]

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the plaintiff, John W. Keogh, in the sum of $137.00 and costs and against the defendant, E. J. Millspaugh for damages resulting to plaintiff's real estate because of defendant's negligence.

Plaintiff alleges that the defendant negligently parked his automobile on Michigan avenue in the City of Chicago, and left it unattended without putting on the emergency brake, or that the emergency brake was not in good working order and as a result thereof plaintiff was damaged by the automobile running through a plate glass window in his building.

Defendant in his affidavit of merits denied that the emergency brake on his car was not in good condition and states that when he parked his automobile he securely fastened it by properly putting on the emergency brake and denies that plaintiff was damaged by reason of any negligence on his part.

The cause was tried upon a stipulation by the parties and it appears from the stipulation that the defendant's car was parked along the west curb of Michigan boulevard about 200 feet south of Ohio street and that the car was on an incline; that the defendant after parking his car went into the building adjacent thereto to make a business call; that he returned in about 20 minutes and saw a crowd around a building located at the southeast corner of Michigan boulevard and Ohio street, which was the building of the plaintiff, and upon investigating discovered that his car had run into one of

[illegible]

JOHN W. ROOSE,

Appellee,

v.

[illegible],

Appellant.

Mr. JUSTICE [illegible] delivered the opinion of the court:

This is an appeal from a judgment [illegible] in the municipal Court in favor of the plaintiff, [illegible], in the sum of $127.00 and costs and against the defendant [illegible] resulting to plaintiff's real estate [illegible]

Plaintiff alleges that [illegible] his automobile on Michigan avenue [illegible] it unattended without putting on the emergency brake, [illegible] that the emergency brake was not in good working [illegible] plaintiff was damaged by the action [illegible] glass window in his building.

Defendant in his [illegible] that the emergency brake on his car was not [illegible] that when he parked his automobile [illegible] putting on the emergency brake [illegible] by reason of any negligence on his part.

The cause was tried [illegible]

it appears from the evidence [illegible] along the west curb of Michigan [illegible] Ohio street and that the car [illegible] after putting his car [illegible] a business call; that [illegible] crowd around a building [illegible] boulevard and Ohio street, [illegible] and upon investigating discovered [illegible]

the windows and damaged the building to the amount specified in the stipulation, or $137.00.

It was further stipulated that defendant did not look his car when he left it but that he did put on his brakes.

It was further stipulated that Police Officer Laichelt would testify on behalf of the defendant as follows: That he was a police officer and was on duty directing traffic at the corner of Michigan and Ohio street and that he saw an automobile rolling down Michigan boulevard and that it crossed the street and ran upon the sidewalk and into the plate glass window of a building at 547 North Michigan avenue; that after the accident he examined the automobile and found that the emergency brake was not on and there was no driver in the car.

It is quite apparent from the foregoing evidence that the car was placed on this incline without any one in charge and in that position such automobile was liable to cause damage.

From the statements made by the police officer, that after the car had run through the window, he examined it and found that the brake was not on and there was no one in the car, it is quite manifest that the damage was caused by the negligence of the defendant.

We are, therefore, of the opinion that for the reasons herein set forth, the judgment of the Municipal Court was correct and the judgment of that court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

the [illegible] and [illegible]
attribution, or [illegible].

It was further [illegible]
car when he left it but [illegible].

It was further [illegible]
would testify on behalf of [illegible]
a police officer and [illegible]
Michigan and Ohio streets [illegible]
Michigan boulevard and [illegible]
sidewalk and into the [illegible]
Michigan avenue; that after [illegible]
and found that the emergency [illegible]
driver in the car.

It is quite [illegible] from [illegible]
car was placed on this [illegible]
position such automobile [illegible].

From the [illegible]
the car had run through the window, [illegible]
brake was not on and [illegible]
that the damage was caused by [illegible].

[illegible] are, therefore, [illegible]
herein set forth, the judgment [illegible]
the judgment of that court is [illegible].

HALE, P.J., and [illegible], J., concur.

54

38455

WORTH MERRITT, Appellee, v. MORTON SAND & GRAVEL COMPANY, a corporation, et al, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 588[4]

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in the Municipal Court against the defendant, the Morton Sand & Gravel Company, on the verdict of a jury, assessing plaintiff's damages at $695.44. There were two defendants to this suit in the court below, Morton Sand & Gravel Company and Sand & Gravel Liquidation Company. It appears from the statement in defendant's brief that the Morton Sand & Gravel Company purchased the Sand & Gravel Liquidation Company and assumed all its liabilities, so in law there was but one defendant, Morton Sand & Gravel Company. Plaintiff was a salesman for the defendant and was engaged in selling sand, gravel and cement on a commission basis.

Considerable evidence was heard on both sides and the main contention seems to be that the plaintiff was not employed to "service the job" or to be paid for selling cement and that he had been paid in full for all services for which defendant was liable. What is meant by "service the job" is that when materials are sold and delivered at a place where buildings are being erected and where the materials are to be used, it is customary for the seller to see that the materials are delivered and unloaded and that they are of the kind which the purchaser desired, - in general to see that the deliveries of materials are satisfactory. There appears to be no question but that the plaintiff did this work, but the defendant

38465

NORTH MERRITT,

Appellee,

v.

MORTON SAND & GRAVEL COMPANY, a corpor-tion, et al,

Appellants.

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

This is an appeal from a judgment rendered in the Municipal Court against the defendants, the Morton Sand & Gravel Company, on the verdict of a jury, assessing plaintiff's damages at $695.44. There were two defendants to this suit in the court below, Morton Sand & Gravel Company and [illegible] Liquidation Company. It appears from the statement in defendant's brief that the Morton Sand & Gravel Company, predecessor to Sand & Gravel Liquidation Company and assumed all its liabilities, so in law there was but one defendant, Morton Sand & Gravel Company. Plaintiff was a salesman for the defendant and was engaged in selling sand, gravel and cement on a commission basis.

Considerable evidence was heard on both sides and the main contention seems to be that the plaintiff was not employed to "service the job" or to be paid for selling sand that had to be had been paid in full for all services for which defendant was liable. What is meant by "service the job" is that when materials are sold and delivered at a place where buildings are [illegible] and where the materials are to be used, it is customary for the seller to see that the materials are delivered and unloaded and that they are of the kind which the purchaser desired, - in general to see that the deliveries of materials are satisfactory. There appears to be no question but that the plaintiff did this work, but the defendant

claims it was done without its knowledge and that it did not hire him to do that work.

George Hartong testified that he was the Vice President and General Manager of the Morton Sand & Gravel Company; that he hired the plaintiff for the purpose of servicing the work; that plaintiff serviced the work of the General Motors Co. at the World's Fair, known as "A Century of Progress" and he was the only representative of the Gravel Company within the grounds; that he told Merritt that they would do what was right by him for handling this work; that no specific rate of compensation was mentioned for servicing the jobs; that Merritt told him that he could procure cement business if they could handle it and that he told Merritt to go ahead and that they would treat him fairly. The witness further stated that he agreed to pay plaintiff 10 cents a yard on the sand, 2 cents on cement and 10 cents on line for any sales made at the Appraisers Stores job; that conditions at the Fair were so chaotic that they required more detailed servicing than any other locality.

From the books of the defendant the plaintiff obtained detailed information stating the amount of material that was sold and delivered which was added to the testimony as to the number of hours he worked and there was also testimony of people in the trade who were experienced and knew the usual, customary and reasonable charge for such services.

The evidence in this case was submitted to a jury who, from the nature of things, are well qualified to determine the value and weight of the evidence and wherein the preponderance lies. It is not the function of a trial court or a reviewing court to substitute its opinion for that of the jury in this regard, unless the judgment is manifestly against the weight of the evidence, in which event it would be not only justified but it would be its duty to correct such error.

claims it was done without its knowledge and that it was not its duty to pay him to do that work.

George Hartong testified that he was the Vice President and General Manager of the Morton Park Travel Company; that he hired the plaintiff for the purpose of servicing the work; that plaintiff serviced the work of the company from 1930 at the World's Fair, known as "A Century of Progress" and he was the only representative of the Travel Company within the grounds; that he told Merritt that they would do what was right by him for handling this work; that no specific rate of compensation was mentioned for servicing the job; that Merritt told him that he could procure cement business if they could handle it and that he told Merritt to go ahead and that they would treat him fairly. The witness further stated that he agreed to pay plaintiff 10 cents a year on the sale, 2 cents on cement and 10 cents on lime for any sales made at the Appraisers Stores job; that conditions at the fair were so chaotic that they required more detailed servicing than any other location.

From the books of the defendant the plaintiff obtained detailed information stating the amount of material that was sold and delivered which was added to the testimony as to the number of hours he worked and there was also testimony of people in the trade who were experienced and knew the usual, customary and reasonable charge for such services.

The evidence in this case was submitted to a jury who, from the nature of things, are well qualified to determine the value and weight of the evidence and wherein the preponderance lies. It is not the function of a trial court to reweigh, weigh or substitute its opinion for that of the jury in this regard, unless the judgment is manifestly against the weight of the evidence, in which event it would be not only justified but it would be its duty to correct such error.

Under the practice of the Municipal Court interrogatories were filed by the plaintiff to be answered by the defendant, which was part of the evidence here.

We do not believe, however, from the evidence submitted to us that the verdict of the jury was manifestly against the weight of the evidence.

It is further claimed by the defendant that the verdict was not in proper form. As already stated, there were two defendants, Morton Sand & Gravel Company and the Sand & Gravel Liquidation Company. The former company, having taken over the latter company, assumed its liabilities.

One of the principal contentions made is that the jury failed to properly determine the guilt of either defendant and that they omitted to sign a verdict against the defendant, although the order of the court in rendering judgment on the verdict assessed the damages against the Morton Sand & Gravel Company. On the written motion for a new trial in the court below this point was not called to the attention of the court and cannot be raised here for the first time. Defendants further contend that a distinction should be maintained between the Morton Sand & Gravel Company and the Sand & Gravel Liquidation Company, and yet in their argument, on page 9 of their brief, they make the following statement:

> "The Morton Sand & Gravel Company took over the business and assets and assumed the liabilities of the Sand & Gravel Liquidation Company in February, 1933."

This contention asking that a distinction be made between the two companies and other contentions of like character, are without merit.

This suit is merely one for services claimed to have been rendered, in which testimony was taken, evidence submitted and other investigations of the facts made and submitted to the

Under the practice of the municipal court, interrogatories were filed by the plaintiff to be answered by the defendant, which was part of the evidence here.

We do not believe, however, from the evidence submitted to us that the verdict of the jury was manifestly against the weight of the evidence.

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One of the principal contentions made is that the jury failed to properly determine the guilt of either defendant and that they omitted to sign a verdict against the defendant, although the order of the court in rendering judgment on the verdict assessed the damages against the Morton Sand & Gravel Company. On the written motion for a new trial in the court below this point was not called to the attention of the court and cannot be raised now for the first time. Defendants further contend that a distinction should be maintained between the Morton Sand & Gravel Company and the Sand & Gravel Liquidation Company, and yet in their argument, on page 9 of their brief, they make the following statement:

> "The Morton Sand & Gravel Company took over the business and assets and assumed the liabilities of the Sand & Gravel Liquidation Company in February, 1929."

This contention making that a distinction be made between the two companies and other contentions of like character, are without merit.

This suit is merely one for services claimed to have been rendered, in which testimony was taken, evidence submitted and other investigations of the facts made and submitted to the

jury and they found for the plaintiff, upon which the judgment of the court was entered and we think rightfully so.

For the foregoing reasons the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

jury and they found for the plaintiff, upon which the judgment of the court was entered and we think rightfully so.

For the foregoing reasons the judgment of the municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALE, P.J. AND MERRI, J. CONCUR.

38541

JOSEPH STUMPFEL, Appellant,

v.

ANNA STUMPFEL, Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

55

285 I.A. 588

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause came before us on a petition for leave to appeal from an order of the Superior Court, which was granted. The order of the trial court, from which this appeal is taken, was entered on November 15, 1934 on a motion to amend a decree of divorce granted to plaintiff Joseph Stumpfel on June 5, 1925. Said order required that plaintiff provide all necessary transportation from Burgenland, Austria to Chicago, Illinois, for the two minor children of the parties.

In June, 1925, Joseph Stumpfel sued his wife for divorce on the grounds of desertion, in the Superior Court of Cook County. Service was had by publication. At that time it appeared from the proof offered by the plaintiff that he had sent transportation for his wife and two minor children to convey them to Chicago, but she refused to leave her native Austria to come to America. Thereupon a decree of divorce was entered on June 5, 1925, in favor of plaintiff.

Some three years later in March, 1928, a petition was filed to vacate and modify the decree so entered. On a stipulation entered at that time and signed by counsel for the parties it was agreed that Joseph Stumpfel would pay the sum of $10 per month as and for the support of the two minor children of the parties, and the petition to vacate and modify the decree was dismissed.

In March, 1930, the defendant, Anna Stumpfel entered this country but took no active steps to vacate, modify or amend the decree of divorce granted in 1925.

In November 1, 1934, Anna Stumpfel filed a verified petition

38641

JOSEPH STUMPFEL, Appellant,	
v.	
ANNA STUMPFEL, Appellee.	

285 I.A. 238

MR. JUSTICE DENIS E. SULLIVAN [illegible] THE COURT:

This cause came before us on a petition for leave to appeal from an order of the Superior Court, which [illegible] the order of the trial court, from which this appeal is taken, [illegible] entered on November 15, 1934 on a motion to [illegible] a decree of divorce [illegible] to plaintiff Joseph Stumpfel on June 5, 1933. [illegible] that plaintiff provide all necessary transportation [illegible] Anna to Chicago, Illinois, for the two minor children of the parties.

In June, 1933, Joseph Stumpfel [illegible] for divorce on the grounds of desertion, in the [illegible] County. Service was had by publication. [illegible] proof offered by the plaintiff [illegible] his wife and two minor children to convey them to [illegible], but she refused to leave her native Austria to come to America. Thereupon a decree of divorce was entered on June [illegible], 1933, [illegible] plaintiff.

Some three years later in [illegible], 1937, [illegible] filed to vacate and modify the decree so entered. [illegible] petition entered at that time and signed by counsel for [illegible] that Joseph Stumpfel would pay the sum of $10 [illegible] and for the support of the two minor children of [illegible], the petition to vacate and modify the decree was dismissed.

In March, 1938, the defendant, [illegible] this country but took no active steps to vacate, modify or [illegible] the decree of divorce granted in 1933.

In November 1, 1934, Anna Stumpfel filed a verified petition

to modify the decree of divorce entered June 5, 1925, to compel the plaintiff, Joseph Stumpfel, to provide transportation from Burgenland, Austria to Chicago, Illinois. After a hearing an order was entered on November 15, 1934, requiring the plaintiff to provide all transportation for the children from Burgenland to Chicago, Illinois. The order reads as follows:

> "Ordered, Adjudged and Decreed that the plaintiff, Joseph Stumpfel, provide all transportation and necessary incidentals for the said minor children from Bergenland, Austria, to Chicago, Illinois, in 30, 60 and 90 days from this date hereof or in the alternative that he shall pay to the defendant, Anna Stumpfel, the amount necessary for the above purpose in the same length of time."

The plaintiff, Joseph Stumpfel, not complying with this order, the defendant, Anna Stumpfel, filed a petition for a rule to show cause. After a hearing the petition was denied and the plaintiff was ordered to comply with the order.

On June 10, 1935, as the plaintiff had not complied with the order, on motion of the defendant, Anna Stumpfel, an order of attachment was entered directing the Sheriff of Cook County, Illinois, to take the plaintiff into custody.

Motions were made by the present attorneys for Joseph Stumpfel to vacate the previous orders and for a stay of attachment. The motion to vacate was denied, but a stay of attachment was granted, at which time the appeal was prayed and on which it comes to this court.

One has but to read the order to see that it should not stand. First it is not made to appear from the order nor is any finding made in the record as to the age of the children, or their sex, whether they are qualified as to health or mentality to be admissible to this country; whether or not the quota of admissible immigrants from Austria is filled, so that they would be permitted to come into the country; and further the order does not provide the amount of money that is necessary and required for this purpose or

to modify the decree of divorce [illegible] the plaintiff, does [illegible] Burgenland, [illegible] was entered on November 1[illegible], 1[illegible], granting the [illegible] all transportation for the children from Austria to [illegible], Illinois. The order reads as follows:

> "Ordered, Adjudged and decreed that [illegible] Joseph Stumpfel, provide all transportation and necessary incidentals for the minor children, [illegible] Burgenland, Austria, to Chicago, Illinois, in [illegible] this date he, or in the alternative, if he shall say to the defendant, Anna Stumpfel, the amount necessary for the above purpose in the same length of time."

The plaintiff, Joseph Stumpfel, [illegible] with this order, the defendant, Anna Stumpfel, filed [illegible] to show cause. After a hearing the [illegible] tiff was ordered to comply with [illegible].

On June 10, 1[illegible], as the [illegible] the order, on motion of the defendant, Anna Stumpfel, a [illegible] attachment was entered directing the [illegible] County, Illinois to take the plaintiff into custody.

Motions were made by the [illegible] Stumpfel to vacate the previous orders and for [illegible] attachment. The motion to vacate was denied, but a stay [illegible] at which time the appeal was [illegible] to this court.

One has but to see the order to see [illegible] would not stand. First it is not [illegible] any finding made in the record as to the age [illegible] sex, whether they are qualified [illegible] admissible to this country; whether or not [illegible] immigrate from Austria in fact, so that they would be admitted to come into the country; and further the order does not [illegible] the amount of money that is necessary and required for this or one of

to whom the transportation, if provided, shall be given and how much of the transportation is to be given in 30, 60 or 90 days. In other words, it must be quite apparent from a reading of the so-called order that it is unenforceable.

For the foregoing reasons the order of the Superior Court is reversed.

ORDER REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

to whom the transportation, [illegible]
much of the transportation is [illegible]
In other words, it must be [illegible]
so-called order that it is [illegible]

For the foregoing reasons [illegible]
Court is reversed.

HALL, J.U. AND [illegible], J., DISSENT.

38572

LOUIS KONTOS,
Appellee,
v.
MIKE GAGIDIS and GUST GAGIDIS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

285 I.A. 589

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court entered on the verdict of a jury in a forcible entry and detainer action brought by Louis Kontos against Mike Gagidis and Gust Gagidis for possession of the premises known as 3547 Armitage avenue, Chicago, Illinois. The jury found the right of possession in the plaintiff. Defendants' motion for a new trial and in arrest of judgment were overruled.

Plaintiff's theory of the case is that the delivery to him of the chattel mortgage and chattel mortgage notes was a part of the original agreement, and that by reason of the defendants' refusal to turn over the same, this refusal canceled the contract and that the plaintiff therefore had a right to the possession of the premises in question.

Defendants' theory is that the plaintiff having received $75, the agreed price of the merchandise in the store, by delivery of the said $75 to plaintiff's lawyer, to be held in escrow until defendants could secure the consent of the landlord to a lease with them, and the plaintiff having surrendered the possession of the premises in question, then when the consent of the said landlord had been obtained, the contract was a consummated contract; that the demand for the return of the chattel mortgage and chattel mortgage notes was an afterthought and came after the agreement was made; that the plaintiff had no right to make any such demand, because he was not

38572

LOUIS KOMTOS, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
MIKE GADIDIS and GUST GADIDIS, Appellants.	OF CHICAGO.

38572A

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court entered on the verdict of a jury in a forcible entry and detainer action brought by Louis Komtos against Mike Gadidis and Gust Gadidis for possession of the premises known as 3847 Montana avenue, Chicago, Illinois. The jury found the right of possession in the plaintiff. Defendants' motion for a new trial and in arrest of judgment were overruled.

Plaintiff's theory of the case is that the delivery to him of the chattel mortgage and chattel mortgage notes was a part of the original agreement, and that by reason of the defendants' refusal to turn over the same, this refusal cancelled the contract and that the plaintiff therefore had right to the possession of the premises in question.

Defendants' theory is that the plaintiff having received $75, the agreed price of the merchandise in the store, by delivery of the said $75 to plaintiff's lawyer, to be held in escrow until defendants could secure the consent of the landlord to lease with them, and the plaintiff having surrendered the possession of the premises in question, then when the consent of the said landlord had been obtained, the contract was consummated contrary; that the demand for the return of the chattel mortgage and chattel mortgage notes was an afterthought and came after the agreement was made; that the plaintiff had no right to make any such demand, because he was not

personally obligated, inasmuch as he had not signed the chattel mortgage or the chattel mortgage notes, and that said demand for the mortgage and chattel mortgage notes was simply an afterthought on the part of Clausen, who, at the time the agreement was made knew that the defendants intended to proceed against Thomas Tomdides to collect the balance due on said note, after applying the proceeds of the chattel mortgage sale to said indebtedness, and that said afterthought was based solely upon the fact that a friend of Clausen desired to lease the premises on behalf of a brewery.

As was suggested on the oral argument, this has now become a moot case for the reason that the length of time on the claimed tenancy, which was the subject-matter of the suit, has expired by its terms. Many witnesses were heard regarding the facts involved and nothing would be gained at this time by an extensive recital of the controversial facts. Suffice it to say that we are of the opinion from a review of the record that the judgment of the Municipal Court should be and the same hereby is reversed, and as the so-called claimed lease has expired by its terms there will be no necessity for remanding the cause.

JUDGMENT REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

personally obligated, inasmuch as he had not signed the original mortgage or the chattel mortgage notes, and th t said defendant for the mortgage and chattel mortgage notes was simply an afterthought on the part of Olmsen, who, at the time the agreement was made knew that the defendants intended to proceed against Thomas Tomkins to collect the balance due on said note. After supplying the proceeds of the chattel mortgage sale to said indebtedness, and th t said after thought was based solely upon the fact that a friend of Olmsen desired to lease the premises on behalf of a brewery.

As was suggested on the oral argument, this has now become a moot case for the reason that the length of time on the claimed tenancy, which was the subject-matter of the suit, has expired by its terms. Many witnesses were heard regarding the facts involved and nothing would be gained at this time by an extensive recital of the controversial facts. Suffice it to say th t we are of the opinion from a review of the record that the judgment of the Municipal Court and the same hereby is reversed, and as the so-called claimed lease has expired by its terms there will be no necessity for remanding the cause.

JUDGMENT REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

38639

57

GEORGE F. KREMM, as Trustee,
Appellee,

v.

WILLIAM H. GEHL, et al,
Defendants.

On Appeal of
WILLIAM H. GEHL,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

235 I.A. 589

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

This is an appeal from a decree entered in the Circuit Court on July 11, 1935, in a foreclosure proceeding. The decree found that in and by a conveyance to him of the property foreclosed, defendant William H. Gehl had assumed and became personally liable for the payment of all of the bonds described in and secured by the trust deed foreclosed and costs involved in the foreclosure proceedings amounting to $58,885.28. The decree further approved the master's finding to the effect that the defendant was personally liable, and retained jurisdiction in the court to enter a deficiency decree in the event the property failed to sell for a sufficient amount to satisfy the deed.

By his answer defendant Gehl admitted an interest in the property and further admitted that he took the property by warranty deed from the Carlsons subject to the mortgage debt, but denied that he assumed and became personally liable for this debt, and prayed to be dismissed from the proceedings.

38839

GEORGE F. KUNZE, as Trustee, Appellee,	
v.	
WILLIAM H. GEHL, et al, Defendants.	
On Appeal of WILLIAM H. GEHL, Appellant.	

MR. JUSTICE DENIS F. SULLIVAN delivered the opinion of the court.

This is an appeal from a decree entered in the Circuit Court on July 11, 1935, in a foreclosure proceeding. The decree found that in and by a conveyance to him of the property foreclosed, defendant William H. Gehl had assumed and became personally liable for the payment of all of the note described in and secured by the trust deed foreclosed and costs involved in the foreclosure proceeding amounting to $38,885.86. The decree further approved the master's finding to the effect that the defendant was personally liable, and retained jurisdiction in the court to enter a deficiency decree in the event the property failed to sell for a sufficient amount to satisfy the deed.

By his answer defendant Gehl admitted an interest in the property and further admitted that he took the property by warranty deed from the Carlsons subject to the mortgage debt, but denied that he assumed and became personally liable for this debt, and prayed to be dismissed from the proceedings.

No replication was filed to the answer and on a hearing before the master the plaintiff failed to present any testimony in support of the allegation of the complaint relative to the assumption of payment of the bonds secured by the trust deed on the part of the defendant Gehl. The master's report, however, found in support of the allegation a personal liability of the defendant Gehl. Upon the hearing, this report of the master was approved by the trial court and a decree entered confirming the master's report and finding the liability of the defendant Gehl as heretofore stated.

The plaintiff has not entered his appearance nor filed any briefs in this court.

We have searched in vain both in the abstract and in the record to find what evidence was introduced supporting the decree with reference to the liability of Gehl. We have found nothing. Allegations without proof will not support a decree.

As our Supreme Court said in the case of Hogg v. Hohmann, 330 Ill. 589, at page 594:

> "It is not true that a decree may be had upon averments and charges. The rule is that the jurisdiction to render a decree rests upon the facts proved at the hearing and which are sufficiently averred in the bill disclosing the jurisdiction to proceed to decree. If not averred and established at the hearing the bill must be dismissed for want of equity."

For the reason that no evidence was introduced to support the charges contained in the bill, the decree of the

No replication was filed to the answer and on a hearing before the master the plaintiff failed to present any testimony in support of the allegation of the complaint relative to the assumption of payment of the bonds secured by the trust deed on the part of the defendant Dahl. The master's report, however, found in support of the allegation a personal liability of the defendant Dahl. Upon the hearing, this report of the master was approved by the trial court and a decree entered confirming the master's report and finding the liability of the defendant Dahl as heretofore stated.

The plaintiff has not entered his appearance nor filed any briefs in this court.

We have searched in vain both in the abstract and in the record to find what evidence was introduced supporting the decree with reference to the liability of Dahl. We have found nothing. Allegations without proof will not support a decree.

As our Supreme Court said in the case of Hogg v. Hohmann, 330 Ill. 389, at page 394:

> "It is not true that a decree may be had upon averments and charges. The rule is that the jurisdiction to render a decree rests upon the facts proved at the hearing and which are sufficiently averred in the bill disclosing the jurisdiction to proceed to decree. If not averred and established at the hearing the bill must be dismissed for want of equity."

For the reason that no evidence was introduced to support the charges contained in the bill, the decree of the

Circuit Court, so far as the defendant Gehl is concerned, is reversed and the cause is remanded with directions to that court to dismiss the said bill as to the defendant Gehl for want of equity.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HALL, P.J. AND HEBEL, J. CONCUR.

Circuit Court, so far as the defendant Dahl is concerned, is reversed and the cause is remanded with directions to that court to dismiss the said bill as to the defendant Dahl for want of equity.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HALL, P.J. AND HEBEL, J. CONCUR.

38667

JOHN C. TAYLOR,
Complainant,
v.
CARL POCH, et al.,
Defendants.

ROBERT J. WATT,
(Petitioner) Appellant,
v.
HOWARD K. HURWITH,
(Respondent) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

285 I.A. 589

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Robert J. Watt made a motion in the Superior Court for leave to file a petition in the above entitled cause, which leave was denied, and it is from that order of the court that the matter comes before us on appeal.

It appears that on July 28, 1932, Howard K. Hurwith was appointed the receiver for the premises in the foreclosure of a first mortgage for $165,000, for the purpose we assume of managing the building and collecting the rents and profits, although such order does not appear in the record.

The record shows that on July 13, 1933, said receiver Hurwith presented his first current account and report in the court of Judge Robert E. Gentzel, and the court being duly advised approved the same; that on January 27, 1934, an order was entered by Judge Robert E. Gentzel that leave be given Robert J. Watt, Secretary of the Citizens State of Chicago Bondholders Protective Committee, to file his objections to the receiver's second current account; that on August 21, 1934, the court by Judge Sabath permitted objections to be filed to the receiver's third account; that on September 17, 1934, Judge Harry A. Lewis overruled objections to the receiver's third current account and report and approved said current account

38667

JOHN C. TAYLOR, Complainant, v. CARL POCH, et al., Defendants.	Appeal from CHANCERY DIVISION
ROBERT L. WATT, (Petitioner) Appellant, v. HOWARD K. HURWITH, (Respondent) Appellee.	COOK COUNTY.

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court:

Robert L. Watt made a motion in the Chancery Court for leave to file a petition in the above entitled cause, which leave was denied, and it is from the order of the court that the matter comes before us on appeal.

It appears that on July 28, 1933, Howard K. Hurwith was appointed the receiver for the premises in the foreclosure of a first mortgage for $185,000, for the purpose of managing the building and collecting the rents and profits, although such order does not appear in the record.

The record shows that on July 17, 1933, said receiver Hurwith presented his first current account and report in the court of Judge Robert E. Gentzel, and the court being duly advised approved the same; that on January 22, 1934, an order was entered by Judge Robert E. Gentzel that leave be given Robert L. Watt, secretary of the Citizens State of Chicago Bondholders Protective Committee, to file his objections to the receiver's second current account; that on August 21, 1934, the court by Judge Gentzel permitted objections to be filed to the receiver's third account; that on September 17, 1934, Judge Harry A. Lewis overruled objections to the receiver's third current account and report and approved said current account

and report; that on November 15, 1934, the court by Judge Harry A. Lewis overruled the objections theretofore filed to the receiver's second current report and account and ratified said report and account; that on January 24, 1935, the court by Judge Lewis approved the receiver's fourth current account and report after a hearing thereon.

No appeal was taken from any of these orders.

It appears from the petition that an order was entered allowing the receiver to employ a resident manager, Sarah Quadow, at $16 per week.

The petition further recites that the accounts and reports of the receiver have been approved by the court; that objections were filed thereto, but the same were not heard in court. This statement is not correct. The orders in this record show the contrary.

Thereupon the petition takes certain items from the accounts which had been approved several years before and states that some of them are purely improper charges and that the various items in the accounts are incorrect, improper and untrue; that this information came to the petitioner subsequently, but it does not say from whom or when he got the information.

The petition further recites that on October 1, 1935, the receiver had an order entered evicting from the building the resident manager, Sarah Quadow, whom the receiver had hired under the order of the court heretofore entered; that the tenants of the building signed a petition to the effect that they wanted Sarah Quadow to remain and that the receiver was attempting to discharge her and have her leave the building, which she is resisting.

The petition asks that all parties be ordered to answer the petition within a short day; that a subpoena <u>duces tecum</u> issue against some 13 individuals or firms alleged to have furnished

and report; that on November 12, 1936, the court by Judge Jerry A. Lewis overruled the objections theretofore filed to the receiver's second current report and account and petition [illegible] report and account; that on January [illegible], 1937, the court by Judge [illegible] approved the receiver's fourth current account and [illegible] thereon.

No appeal was taken from any of these orders.

It appears from the petition that an order was entered allowing the receiver to employ a resident [illegible], Sarah Hudson, at $16 per week.

The petition further recites that the accounts and reports of the receiver have been approved by the court; that objections were filed thereto, but the same were not heard in court. This statement is not correct. The records in this proceeding show the contrary.

Thereupon the petition takes certain items from the accounts which had been approved several years before and states that some of them are purely improper charges, or that the various items in the accounts are incorrect, improper and untrue; that this information came to the petitioner subsequently, but it does not say from whom or when he got the information.

The petition further recites that on October 1, 1936, the receiver had an order entered evicting from the building the resident manager, Sarah Hudson, when the receiver had first under the order of the court heretofore entered; that the tenants of the building signed a petition to the effect that they wanted Sarah Hudson to remain and that the receiver was attempting to discharge her and have her leave the building, which she is resisting.

The petition asks that all parties be ordered to answer the petition within a short day; that a subpoena duces tecum issue against some 13 individuals or firms alleged to have furnished

material or services to the receiver; that the writ of assistance against the resident manager, Sarah Quadow, be stayed pending the hearing on the petition and that pending the hearing Sarah Quadow be permitted to collect the rents and deposit the same with the clerk of the court; that Hurwith be removed as receiver and such other and further orders as equity may require.

At the time the petition was presented in court, objections thereto were made by the receiver and his counsel calling attention to the fact that the petitioner had theretofore filed objections to the reports of the receiver; that the same had been considered by the trial court and objections had been filed thereto by the petitioner and the same had been overruled and that no appeal had ever been taken therefrom.

From the record as presented one cannot fail to observe that, apparently, petitioner is interested in keeping the manager of the building, Mrs. Quadow in possession thereof. Just how the petition of tenants to retain the assistant of the receiver in her position against the receiver's wishes would be conducive to a successful management of the building, it is difficult for us at this distance and with the meager information before us to fathom. We hesitate to adopt defendants theory that this petition was merely filed for spite. We fully agree that a receiver's report should be closely scrutinized in order that the property may be conserved for the benefit of the creditors and owners.

While it is the duty of the court to pass upon the receiver's reports and any objections thereto and also give to every interested person who properly appears before him an opportunity to be heard on any objections to the actions of a receiver, either before the court or before the Master, yet - once having passed upon the objections to the receiver's report - the court should be equally as careful not

material or services to the receiver; that the right of assistance against the resident manager, Sarah Gudow, be stayed pending the hearing on the petition and that pending the hearing Sarah Gudow be permitted to collect the rents and deposit the same with the clerk of the court; that Hurwith be removed as receiver and such other and further orders as equity may require.

At the time the petition was presented in court, objections thereto were made by the receiver and his counsel calling attention to the fact that the petitioner had theretofore filed objections to the reports of the receiver; that the same had been considered by the trial court and objections had been filed thereto by the petitioner and the same had been overruled and that no appeal had ever been taken therefrom.

From the record as presented we cannot fail to observe that, apparently, petitioner is interested in ousting the manager of the building, Mrs. Gudow in possession thereof. Just nor the petition of tenants to retain the assistant of the receiver in her position against the receiver's wishes would be conducive to a successful management of the building, it is difficult for us at this distance and with the meager information before us to [illegible]. We hesitate to adopt defendants theory that this petition was merely filed for spite. We fully agree that a receiver's report should be closely scrutinized in order that the property may be conserved for the benefit of the creditors and owners.

While it is the duty of the court to pass upon the receiver's reports and any objections thereto and also give to every interested person who properly appears before him an opportunity to be heard on any objections to the actions of a receiver, either before the court or before the Master, yet - once having passed upon the objections to the receiver's report - the court should be equally as careful not

to create additional costs and fees against the estate by again going over the same subject-matter that has once been passed upon, without a showing as to why the evidence in relation to the objections was not presented at the time of the former hearings of the objections. The trial court must, necessarily, have some discretion in the handling of these matters.

In this case the petition does not state why proof could not be obtained at the proper time, excepting the statement that information came to them since that time.

During the pendency of a chancery suit, the court must of necessity retain jurisdiction to pass upon any and all actions and doings of its receivers, as well as their reports and accounts, and the practice is to permit parties in interest to appear and file their petitions on a subject matter which has a substantial relation thereto and in which petitioner has an interest. Whether the petition is sufficient or whether it requires an answer can then be disposed of by the court.

For the foregoing reasons we are of the opinion that the court should have permitted the petition to be filed. Therefore the order of the Superior Court denying said petition is reversed and the cause is remanded for a new trial.

ORDER REVERSED AND CAUSE REMANDED.

HALL, P.J. AND HEBEL, J. CONCUR.

to create additional costs and fees against the estate by again going over the same subject-matter that has once been passed upon, without a showing as to why the evidence in relation to the objections was not presented at the time of the former hearings of the objections. The trial court must, necessarily, have some discretion in the handling of these matters.

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For the foregoing reasons we are of the opinion that the court should have permitted the petition to be filed. Therefore the order of the Superior Court denying said petition is reversed and the cause is remanded for a new trial.

ORDER REVERSED AND CAUSE REMANDED.

HALE, P.J., AND HERSH, J., CONCUR.

38407.

In Re: Estate of MARIA TURNER, Deceased.

MARY FLETCHER BRAMMER et al., Appellants,

vs.

FERDINAND W. PENN, Executor, etc., et al., Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

63 A

285 I.A. 589

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by certain persons who claim to be the heirs at law and next of kin of Maria Turner, who died at Chicago, Illinois, February 29, 1932. Another phase of the matter was before this court on a former appeal. In re Estate of Turner, 275 Ill. App. 366. There, it appeared the Probate court of Cook county entered an order setting aside a former judgment which found Joseph Offet to be the only heir at law and next of kin of Maria Turner. The Circuit court, upon appeal, held the order was not a final determination of the heirship of Maria Turner and dismissed the appeal for that reason. This court also held the order of the Probate court was not final and affirmed the decree of the Circuit court.

The evidence in support of the claim of Joseph Offet (if he now persists in such claim) is not in this record. The evidence is inconsistent with such claim.

While the Circuit court made a negative finding that the claimants are not the heirs at law and next of kin, there was no affirmative finding as to who are such. The decree leaves that question undetermined. The parties who object offered no evidence. They contend the competent evidence submitted in behalf of claimants was insufficient to prove their claims prima facie and say if it is conceded the evidence was sufficient, nevertheless it

38407.

In Re: Estate of MARIA TURNER, Deceased.	
MARY HINTOUGH BRAMMER et al., Appellees,	
vs.	
FERDINAND W. TURNER, Executor, etc., et al., Appellees.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by certain persons claiming to be the heirs at law and next of kin of Maria Turner, deceased, from a decree of the Circuit Court of Cook County, Illinois, February 22, 1935. Another decree of the Probate Court was reversed by the decree of this court on a former appeal. In re Estate of Turner, 273 Ill. App. 366. There, it appeared the Probate Court of Cook County entered an order setting aside a former judgment in favor of Ferdinand Joseph Ottet to be the only [illegible] heir at law and next of kin of Maria Turner. The Circuit Court, upon appeal, [illegible] the order was not a final determination of the heirs [illegible] and dismissed the appeal for that reason. This court reversed the order of the Probate Court was not final and affirmed the order of the Circuit Court.

The evidence in support of the claim of Ferdinand Ottet (if he now persists in such claim) is not in this record. The evidence is inconsistent with such claim.

While the Circuit Court made a negative finding that the claimants are not the heirs at law and next of kin, there was no affirmative finding as to who are such. The decree leaves that question undetermined. The parties who object offered no evidence. They contend the competent evidence admitted in behalf of claimants was insufficient to prove their claims prima facie and say

appears under the undisputed evidence, as a matter of law, that claimants, by reason of impediments (which we will later consider) are not and cannot be held to be such heirs at law and next of kin.

The evidence does not disclose the precise date of the birth of Maria Turner. It appears, however, that she was born in Windsor, Canada, and, the census of 1861 would indicate, in the year 1860. The maiden name of her mother was Mary Elizabeth Woodfork, who was born a slave and prior to migrating to Canada lived at Lynchburg, Virginia. She was a person of color and lived with her family, as the evidence indicates, in a frame house on McDougal street in Windsor. The evidence also tends to show that she was married to Lucian Fletcher, who was also known as "Evolution" Fletcher. The names Lucian Fletcher and Mary Elizabeth Fletcher appear upon memorials of indentures conveying the real estate upon which the family afterward lived. These memorials were made in the year 1859, the one showing the conveyance of property to Mary E. Fletcher, therein described as a "spinster," and another showing the conveyance of the same property by Mary E. Fletcher to Lucian Fletcher. The assessment roll for the second ward of the town of Windsor, Canada, for the year 1859 shows the occupants of this property to be "Fletcher, L. C."; that he was by occupation a laborer, was a householder and that his age was 35 years (indicating that he was born in 1824.) The same assessment roll for the year 1860 shows the occupant of this property to be "Lucian Fletcher"; that his occupation is "c.m.--Lab."; that he is a "freeholder" and 36 years of age. The census already referred to, apparently taken in 1861, shows this property to be occupied by a family consisting of one married person, a washerwoman, Mary Fletcher, who was born in the United States and 33 years of age at her next birthday; that the other occupants were two females - Sally, born in the United States, six years of age at her next

appears under the undisputed evidence, [illegible] claimants, by reason of impediments (which [illegible]) are not and cannot be held to be [illegible] kind.

The evidence does not disclose the [illegible] birth of Maria Turner. It is very, so exist, that she was born in Windsor, Canada, and, the census of 1861 would [illegible], in the year 1850. The maiden name of her [illegible] -ford, who was born a slave and prior to [illegible] lived at Lynchburg, Virginia. She was a person of [illegible] with her family, as the evidence indicates, in a frame house on [illegible] street in Windsor. The evidence also tends to show that she was married to Lucian Fletcher, who was also known as "William" Fletcher. The names Lucian Fletcher [illegible] Fletcher appear upon memorials of indentures covering the real estate upon which the family afterward lived. These memorials were made in the year 1859, the one showing the conveyance of property to Maria A. Fletcher, therein described as a "relative," and [illegible] the conveyance of the same property by Maria [illegible] to Lucian Fletcher. The assessment roll for the [illegible] of the town of Windsor, Canada, for the year 1859 [illegible] of this property to be "Fletcher, L. C."; there [illegible] a laborer, was a homeowner and [illegible] (indicating that he was born in 1824.) The same assessment roll for the year 1860 shows the occupant [illegible] "Lucian Fletcher"; that his occupation is "[illegible]"; that he is a "freeholder" and 36 years of age. The county atlas referred to, apparently taken in 1861, shows this property to be occupied by a family consisting of one married person, a washerwoman, Mary Fletcher, who was born in the United [illegible] and 40 years of age at her next birthday; that the other occupants were two [illegible] - Sally, born in the United States, six years of age at her next

birthday, and Maria, born in Canada, two years of age at her next birthday, and two males - Moses, born in the United States, four years of age at his next birthday, and Sampson, born in Canada, who would be one year of age at his next birthday. The assessment roll for the same property in the town of Windsor for the year 1861 shows the occupant to be "Mrs. Fletcher, widow, and freeholder."

The evidence further shows that Sally was also known as Sarah; that she moved to Chicago, Illinois, and was twice married, first to Nathaniel Brown and afterward to Robert Thornton; that both her husbands predeceased her, and that she left no child or children her surviving. Proof of heirship in the estate of Sarah Thornton was made by the testimony of Maria Turner, who stated that she was her sister; that the name of Sarah's father was Evolution Fletcher; that the name of her mother was Mary E.; that both father and mother were dead and that both died prior to the death of Sarah Thornton, which was July 18, 1919. She further stated that her father and mother were married only once and then to each other; that three children were born of that marriage - Sarah, the deceased, Moses, who died before Sarah at the age of 24 years; that Moses was never married and had never adopted any child or children; that she, herself, was married to S. B. Turner, who was living; that these children, Sarah, Moses and herself, were all the children born to her father and mother, and that they had never adopted any child or children, so that she (Maria Turner) was the sister of Sarah Thornton and her only heir at law and next of kin.

The precise date of the death of Mary Elizabeth Fletcher does not appear, but Albert Venerable, who lived in Windsor and went to school with Sarah Fletcher, testified that he did not know anything about the mother of Sarah, but that when he was five or six years old he attended her funeral and remembered seeing Sarah at the funeral. He was 69 years of age when he testified, so that

birthday, and Maria, born in Canada, two years of age at her next birthday, and two males - Moses, born in the United States, four years of age at his next birthday, and Jasper, born in Canada, who would be one year of age at his next birthday. The assessment roll for the same property in the town of Dunnet for the year 1861 shows the occupant to be "Mrs. Fletcher, widow, and Dunnet,"

The evidence further shows that Sarah also known as Sarah; that she moved to Chicago, Illinois, and was twice married, first to Nathaniel Brown and afterward to Robert Thornton; that both her husbands predeceased her, and that she left no child or children her surviving. Proof of relating in the estate of Sarah Thornton was made by the testimony of Maria Turner, who stated that she was her sister; that the name of Sarah's father was Nathaniel Fletcher; that the name of her mother was Mary A.; that both father and mother were dead and that both died prior to the death of Sarah Thornton, which was July 14, 1910. The witness stated that her father and mother were married only once and then to each other; that three children were born of that marriage - Sarah, the deceased, Moses, who died before Sarah at the age of 14 years; that Moses was never married and had never adopted any child or children; that she, herself, was married to S. R. Turner, who was living; that these children, Sarah, Moses and herself, were all the children born to her father and mother, and that they had never adopted any child or children, so that she (Maria Turner) was the sister of Sarah Thornton and her only heir at law and next of kin.

The precise date of the death of Mary Elizabeth Fletcher does not appear, but Albert Venerable, who lived in Windsor and went to school with Sarah Fletcher, testified that he did not know anything about the mother of Sarah, but that when he was five or six years old he attended her funeral and remembered seeing Sarah at the funeral. He was 69 years of age when he testified, so that

her death evidently occurred about 1872.

The community in which the Fletchers lived at Windsor was a colored community. There is no direct evidence as to how or exactly when Mary Elizabeth Woodfork migrated from Virginia to Canada. We can take official notice of the historical fact that in many of the states of the United States at that time the normal status of colored persons was that of slavery, and that the law of the nation required that fugitive slaves escaping from service should be returned to their owners in the states in which they were bound to such service; that slavery was not recognized in the Dominion of Canada, and that many such slaves sought to obtain their freedom by crossing over to the jurisdiction where slavery was illegal. The only other material evidence so far as the Fletcher family of Windsor, Canada, is concerned is hearsay, admissible only for the purpose of proving pedigree.

There is testimony of this kind to the effect that Lucian Fletcher, who was married to this slave woman, was a white man; that he came from a prominent Virginia family of the same name; that he had been involved in some troubles there which caused the family to desire him to leave; that he was given two slaves, a man and a woman, and left Virginia for West Virginia with them; that the man slave died; that Lucian became involved in serious trouble there and left with the woman slave, journeying toward Canada; that at the Canadian border the colored folks refused to let these two pass over unless they were married; that accordingly a ceremony was performed and they assumed the marriage relationship; that thereafter Lucian Fletcher went to California where he died of a fever. This, the record discloses, is substantially the tradition of the Fletcher family of Windsor, Canada, concerning the origin of that family.

The evidence already recited indicates that, like most traditions, it in some respects inaccurate. The memorial of the

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The community in which the Fletcher family lived was a colored community. There is no direct evidence as to how or exactly when Mary Elizabeth Woodfork migrated from Virginia to Canada. We can take official notice of the historical fact that in many of the states of the United States at that time the normal status of colored persons was that of slavery, and that the law of the nation required that fugitive slaves escaping from service should be returned to their owners in the states in which they were bound to such service; that slavery was not recognized in the Dominion of Canada, and that many such slaves sought to obtain their freedom by crossing over to the jurisdiction where slavery was illegal. The only other material evidence so far as the Fletcher family of Windsor, Canada, is concerned is oral, admissible only for the purpose of proving pedigree.

There is testimony of this kind to the effect that Lucian Fletcher, who was married to this slave woman, was a white man; that he came from a prominent Virginia family of the same name; that he had been involved in some troubles over which caused the family to desire him to leave; that he was given two slaves, a man and a woman, and left Virginia for West Virginia with them; that the man slave died; that Lucian became involved in serious trouble there and left with the woman slave, four cross toward Canada; that at the Canadian border the colored folks refused to let these two pass over unless they were married; that accordingly a ceremony was performed and they assumed the marriage relationship; that thereafter Lucian Fletcher went to California where he died of a fever. This, the record discloses, is substantially the tradition of the Fletcher family of Windsor, Canada, concerning the origin of that family.

The evidence already recited indicates that, like most traditions, it is in some respects inaccurate. The memorial of the

real estate transactions, as we have already recited, indicates that Mary Elizabeth Fletcher at the time of the purchase of the real estate on which the family lived in Windsor was "a spinster." Maria Turner testified positively in the estate of her sister, Sarah Thornton, that the father and mother were married, and only once. The relationship they assumed to each other shows that the public officials with whom they dealt recognized the existence of this marriage between them, but the facts that the census report shows that two of the children were born in the United States and that Mary Elizabeth was described as a spinster while dealing in real estate indicates that the marriage took place in Canada and not in the United States.

The evidence further shows without dispute that a certain Lucian Fletcher, the son of Elijah Fletcher and Maria A. Fletcher, was born at Lynchburg, Virginia, in 1824. His name and age are therefore identical with that of Lucian Fletcher, the father of Maria Turner and husband of Mary Elizabeth Woodfork Fletcher. The evidence shows that this Lucian Fletcher of Lynchburg, Virginia, did not go to California in search of gold in 1860, nor did he die of fever in California thereafter. On the contrary, the records of the United States War Department at Washington show that "Lucien", name also known as "Lucian Fletcher," served as a private and sergeant in Captain Hardwicke's Company, Lee's Bettery, Virginia Light Artillery, which company was also in service with Braxton's Battalion of Light Artillery, Confederate States Army; that he enlisted May 28, 1861, at Lynchburg, Virginia, to serve during the period of the war; that he was assigned as a private to Captain Pierce B. Anderson's Company of Artillery, which subsequently became Captain Hardwicke's Company; was promoted to the grade of sergeant June 7, 1861; reduced to private December 21, 1861, and was reported on the roll of the company as present to October 31, 1863; that the

real estate transactions, as we have already recited, indicates that Mary Elizabeth Fletcher at the time of the purchase of the real estate on which the family lived in Kingsport was a "spinster." Maria Turner testified positively in the matter of her sister, Sarah Thornton, that the father and mother were married, and only once. The relationship they assumed to each other and that the public officials with whom they dealt recognized the existence of this marriage between them, but the Tenth and the census report shows that two of the children were born in the United States and that Mary Elizabeth was described as a spinster while dealing in real estate indicates that the marriage took place in Canada and not in the United States.

The evidence further shows that a certain William Fletcher, the son of British Fletcher and Maria A. Fletcher, was born at Lynchburg, Virginia, in 1824. His name and age are therefore identical with that of Lucian Fletcher, the father of Maria Turner and husband of Mary Elizabeth Woodfork Fletcher. The evidence shows that this Lucian Fletcher of Lynchburg, Virginia, did not go to California in search of gold in 1850, nor did he die of fever in California thereafter. On the contrary, the records of the United States War Department at Washington show that "William", also known as "Lucian Fletcher," served as a private and sergeant in Captain Hardwicke's Company, Lee's Battery, Virginia Light Artillery, which company was also in service with Freeman's Battalion of Light Artillery, Confederate States Army; that he enlisted May 28, 1861, at Lynchburg, Virginia, to serve during the period of the war; that he was assigned as a private to Captain Pleice's, Walker's Company of Artillery, which subsequently became Captain Hardwicke's Company; was promoted to the grade of sergeant June 7, 1861; reduced to private December 31, 1861, and was reported on the roll of the company as present to October 31, 1862; that the

next roll call on which his name appears is that covering the period from September 1, 1864, to December 31, 1864, which shows him "absent at Richmond undergoing sentence of g.c.m.; that by an order dated March 13, 1865, designated as Special Order No. 65, Department and Army, Northern Virginia, the sentence of the general court martial was remitted. The Union Prisoner of War Records shows he was captured April 2, 1865; that he was imprisoned at Fort Delaware April 4, 1865, and was released from that post June 20, 1865, on taking the oath of allegiance to the United States. His personal description is thus recorded:

> "Age 37 years; place of residence Amherst County, Virginia; complexion sallow; hair dark; eyes gray; height 5 feet, seven inches."

A photostatic copy of the oath of allegiance which he signed is in evidence.

The family Bible of the Virginia family of the Fletchers, to which Lucian, the husband of Frances Everett Fletcher, belonged, was produced on the hearing by a member of that family, in whose possession it now is. There is written in longhand on the fly leaf of this Bible, the phrase, "Lucian Fletcher, Tusculum, July 1840," and this phrase was identified as being in the handwriting of this Lucian Fletcher. An entry in this Bible also shows the birth of Lucian Fletcher in the year 1824. As already stated, the signature, "Lucian Fletcher," appears on a memorial in Canada for the conveyance of real estate in 1859. Howard A. Rounds, a handwriting expert, testified that the signature on the memorial for the conveyance of real estate made in Canada in 1859 and the signature on the oath of allegiance taken by Lucian Fletcher June 20, 1865, were made by the same person. It was stipulated by the parties that another handwriting expert, Mr. Walter, who was engaged in the Hauptmann trial in the Lindbergh case and could not be

next roll call on which it was suspected that [illegible] the period from September 1, 1864, to December 31, [illegible], which shows him "absent at discretion during the terms of [illegible]; [illegible] by an order dated March 17, 1865, designated as special order [illegible], War Department and Army, northern Virginia, the sentence of the general court martial was remitted. The union prisoner of [illegible] records shows he was captured April 3, 1865; that he was imprisoned at Fort Delaware April 4, 1865, and was released from that post June 20, 1865, on taking the oath of allegiance to the United States. His personal description is thus recorded:

"Age 37 years; place of residence Mount [illegible], Virginia; complexion sallow; hair dark; eyes gray; height [illegible] inches."

A photostatic copy of the oath of allegiance [illegible] is in evidence.

The family Bible of the Virginia [illegible] to which Lucian, the husband of Frances [illegible], was produced on the hearing by a [illegible] in possession it now is. There is [illegible] leaf of this Bible, the phrase, "Lucian Fletcher, [illegible] 1840," and this phrase was [illegible] of this Lucian Fletcher. An entry in this [illegible] birth of Lucian Fletcher in the year 1834. The signature, "Lucian Fletcher," appears on [illegible] for the conveyance of real estate in 1838. [illegible], a handwriting expert, testified that the [illegible] for the conveyance of real estate made in [illegible] the signature on the oath of allegiance taken by [illegible] June 20, 1865, were made by the same person. It was [illegible] by the parties that another handwriting expert, Mr. [illegible], [illegible] engaged in the Hauptmann trial in the Lindbergh case [illegible] not be

present by reason of that engagement, would, if present, testify substantially to the same opinion. No evidence to the contrary was submitted.

The evidence also shows that a marriage license was issued by the clerk of the County court of Amherst county, Virginia, October 28, 1880, to Lucian Fletcher and Frances Everett, and a return upon it indicates that they were married about that time, which was, as we have seen, after the death of Mary Fletcher of Windsor, Canada. The license states that both parties were white; that he was 56 years of age, she 35; that the parents fof the husband were Elijah and Mary A. Fletcher, and that the husband was by occupation a farmer. A death certificate shows that Frances E. Fletcher died January 1, 1932; that she was the widow of Lucian Fletcher and was born November 22, 1844.

The evidence also shows that this Lucian Fletcher, husband of Frances Fletcher, died in Virginia in 1895, after the death of Mary Fletcher of Windsor, Canada, and before the death of Frances Everett Fletcher. The claimants, Mary Fletcher Brammer, Flavonia Fletcher Coffey and Cornelia Flora Fletcher Grow, are, as the evidence shows, daughters of Lucian Fletcher by Frances E. Fletcher. Another daughter of said Lucian and Frances was Lucy Fletcher Hill, who died leaving an only child, Leslie Hill, who is also dead; both died before Maria Turner. Leslie Hill left him surviving Jenette Frances Hill, Virginia Peace Hill and Wanda Mae Hill, his only heirs at law and next of kin. These three daughters of Leslie Hill and the three daughters of Lucian and Frances Fletcher, namely, Mary Fletcher Brammer, Flavonia Fletcher Coffey and Cornelia Flora Fletcher Grow, are the claimants. They all base their claims upon the theory that Lucian Fletcher, father of Maria Turner and husband of Mary Elizabeth Woodfork, was the same

present by reason of that engagement, would, if present, testify substantially to the same opinion. No evidence to the contrary was submitted.

The evidence also shows that a marriage license was issued by the clerk of the County court of Amherst county, Virginia, October 28, 1880, to Lucian Fletcher and Frances Everett, and a return upon it indicates that they were married about that time, which was, as we have seen, after the death of Mary Fletcher of Windsor, Canada. The license states that both parties were white; that he was 36 years of age, she 35; that the parents of the husband were Milton and Mary A. Fletcher, and that the husband was by occupation a farmer. A death certificate and a [illegible] show Fletcher died January 1, 1932; that she was the widow of Lucian Fletcher and was born November 22, 1844.

The evidence also shows that this Lucian Fletcher, husband of Frances Fletcher, died in Virginia in 1892, after the death of Mary Fletcher of Windsor, Canada, and before the death of Frances Everett Fletcher. The claimants, Mary Fletcher Brewer, Flavoria Fletcher Coffey and Cornelia Flora Fletcher Grow, [illegible], on the evidence shows, daughters of Lucian Fletcher by Frances E. Fletcher. Another daughter of said Lucian and Frances was Ann Fletcher Hill, who died leaving an only child, Mamie Hill, who is also dead; both died before Maria Turner. Mamie Hill left [illegible] surviving [illegible] Frances Hill, Virginia Peace Hill and Wanda Lee Hill, her only heirs at law and next of kin. These three [illegible] of Mamie Hill and the three daughters of Lucian and Frances Fletcher, namely, Mary Fletcher Brewer, Flavoria Fletcher Coffey and Cornelia Flora Fletcher Grow, are the claimants. They all base their claims upon the theory that Lucian Fletcher, father of Maria Turner and husband of Mary Elizabeth Goodwork, was the same

Lucian Fletcher who, after the death of his first wife in Canada married Frances Everett in Virginia. In addition to the documentary evidence already described, they produced evidence as to the traditions of their own family tending to corroborate the tradition of the Fletcher family in Canada. Mary Fletcher Brammer testified that the signature on the memorial of the indenture of transfer of real estate is the signature of her father, Lucian Fletcher.

Frank Briscoe, husband of Alma Coffey, whose mother Flavonia Coffey, was a daughter of Lucian Fletcher of Virginia by Frances Everett, testified that he knew Frances Everett Fletcher for many years, and that when he became a member of the family their friendship became quite intimate. He says that he discussed her family history with her, and that she told him of the many escapades of Lucian Fletcher of Virginia; that, in substance, she told him that she herself was a native of Amherst county, Virginia; that she married Lucian Fletcher about the close of the Civil war; that shortly after they were married dissension arose, caused by reports of the former escapades of her husband; that when he was 25 or 30 years of age there was trouble in his home town which caused dissension between him and his father and his father's people; that they gave him some money and a couple of slaves - a man and a woman; that the name of the man was Arch and that the name of the woman was Mary Elizabeth Woodfork; that the three "drifted over" to Fayette county, West Virginia, stayed there for awhile and then left; that they "drifted" north toward the Canadian line; that Lucian told her that in order to get the slave woman over to the Canadian side, it was necessary for him to marry her. The witness also said that in May, 1928, a daughter of Frances Fletcher and Lucian Fletcher, Mrs. Flavonia Coffey, came to live in his home and was there for about a year; that he talked with this daughter of Lucian Fletcher about her father's escapades; that she

Lucian Fletcher who, after the death of his first wife in Canada married Frances Everett in Virginia. In addition to the documentary evidence already described, they produced evidence as to the traditions of their own family tending to corroborate the tradition of the Fletcher family in Canada. Mary Fletcher Kramer testified that the signature on the memorial of the instrument of transfer of real estate is the signature of her father, Lucian Fletcher.

Frank Briscoe, husband of Alma Dolley, whose mother Flavonia Dolley, was a daughter of Lucian Fletcher of Virginia by Frances Everett, testified that he knew Frances Everett Fletcher for many years, and that when he became a member of the family their friendship became quite intimate. He says that he discussed her family history with her, and that she told him of the many escapades of Lucian Fletcher of Virginia; that, in substance, she told him that she herself was a native of Amherst county, Virginia; that she married Lucian Fletcher about the close of the Civil war; that shortly after they were married disagreeable rumors, caused by reports of the former escapades of her husband; that when he was 25 or 30 years of age there was trouble in his home town which caused disagreeable between him and his father and his father's people; that they gave him some money and a couple of slaves - a man and a woman; that the name of the man slave was Abram; that the name of the woman was Mary Elizabeth Wooldorf; that the three "drifted over" to Fayette county, West Virginia, stayed there for awhile and then left; that they "drifted" north toward the Canadian line; that Lucian told her that in order to get the black woman over to the Canadian side, it was necessary for him to marry her. The witness also said that in May, 1922, a daughter of Frances Fletcher and Lucian Fletcher, Mrs. Flavonia Dolley, came to live in his home and was there for about a year; that he talked with this daughter of Lucian Fletcher about her father's escapades; that she

said, "My father was in a good many scrapes." This witness (Frank Briscoe) also indentified an Episcopal prayer book as being a part of the family records of the Virginia Fletchers and also a letter written by Lucian Fletcher to his daughter Flavonia. The prayer book, which is in the possession of the wife of the witness, is claimant's exhibit 18-C. The letter, dated at Lynchburg, October 8, 1893, is exhibit 36, received in evidence for the purpose of showing that Lucian Fletcher accepted the children born to Frances Everett Fletcher prior to their marriage as his own children. The witness also testified that the general tradition of the family was that claimants, Mary Fletcher Brammer, Flavonia Fletcher Coffey, and Cornelia Flora Fletcher Grow, were recognized as the children of Lucian Fletcher.

One of the traditions about Lucian Fletcher was that in an altercation over a colored woman he inflicted wounds upon another man, from which the man afterward died, and that this was one of the reasons why Lucian and the slave woman made the journey to Canada, crossing somewhere about Detroit, "across the Detroit river."

Mary F. Brammer testified that she was the daughter of Lucian Fletcher and Frances Everett Fletcher; that her father and mother lived together for about 22 years; that they lived on a farm owned by Sydney Fletcher, a brother of Lucian; that there were many disputes between her father and mother about "this West Virginia thing"; that her father's folks sent him out to West Virginia with the slaves to get rid of him; that he had so many troubles and so many fights that he took one of the slaves and went off to Canada; that she heard her father and mother frequently quarreling "all the time about going to Canada, and all about the

said, "My father was in a good many scrapes." [illegible] (Frank Bridges) also [illegible] being a part of the family records of the Virginia [illegible] and also a letter written by Lucian Fletcher [illegible] Flavonia. The prayer book, which [illegible] wife of the witness, is already exhibit 14-C. The letter, dated at Lynchburg, October 3, 1873, is [illegible], received in evidence for the purpose of [illegible] accepted the children born to Frances Virginia [illegible] their marriage as his own children. [illegible] that the general tradition of the family was that [illegible] Mary Fletcher Bramner, Flavonia [illegible], and [illegible] Flora Fletcher grew, were recognized as the children of [illegible] Fletcher.

One of the traditions about Lucian [illegible] an altercation over a colored woman [illegible] another man, from which the man [illegible] one of the reasons why Lucian [illegible] journey to Canada, crossing [illegible] about secretly, "across the Detroit river."

Mary E. Bramner testified [illegible] Lucian Fletcher and Frances Overton [illegible]; [illegible] father and mother lived together [illegible] about May [illegible]; [illegible] lived on a farm owned by Sydney Fletcher, a [illegible]; that there were many disputes between her father and [illegible] about "this West Virginia thing"; that her father's [illegible] out to West Virginia with the slaves to get rid [illegible]; [illegible] so many trouble and so many fights that [illegible] the slaves and went off to Canada; that she heard her father and mother frequently quarreling "all the time about going to Canada, [illegible] all about the

fights and murders, and I don't know what all." To the request, "Tell what you heard. Why they said he went away," she replied:

"There was a terrible murder and his people wanted to get rid of him, and they bought this place out in the wilds of West Virginia and sent him out there with two slaves, and he stayed there awhile. I don't know how long. Anyway, the man died. He was killed. I don't know what happened to him and they were going to kill him, I guess, and he took this woman and left with her-- I heard him tell it many times, when he got to the border they wouldn't let him across and they had a ceremony before he could cross the border. These slaves they gave him were Arch and the woman was named -- I cannot remember 50 years ago what happened."

This witness also said that her father taught her to write; that there was no school near; that she saw his handwriting and his signature many times and was acquainted with the signature and would know it anywhere. She identified the signature on the letter from Lucian Fletcher to Flavonia (Exhibit 36) and the signature on the bottom of the second page of Exhibit 9 as those of her father, Lucian Fletcher.

Exhibit 7, a death certificate, shows that Frances E. Fletcher died January 1, 1932; that she was white and the widow of Lucian Fletcher; that she was born November 22, 1844.

One of the daughters, Lucy, was married first to a man named Hill, and afterward on April 25, 1901, to Stonewall Scott. The license to marry issued by the clerk of the Circuit court of Rock Ridge county, Virginia, shows that Lucy was then 29 years of age, which would indicate that she was born in 1872, eight years before the marriage of her father and mother. The evidence, however, shows that Lucian Fletcher, after the marriage recognized all these children of Frances Everett as his own.

We hold the evidence above recited (there being none to the contrary) makes out a prima facie case for these claimants.

The objectors, however, contend that Mary Frances Brammer, Frank Briscoe (husband of a daughter of Flavonia Coffey) and Mrs. John J. Williams were interested witnesses within the definition of section 2, chapter 51 (Ill. State Bar Stats. 1935, p. 1615) and

fights and murders, and I don't know what it." To the request, "Tell what you heard. Why they said he went away," she replied:

"There was a terrible murder and his people wanted to get rid of him, and they bought this place out in the wilds of West Virginia and sent him out there with two slaves, and he stayed there awhile. I don't know how long. Anyway, he was sick. He was killed. I don't know what happened to him or why they were going to kill him, I guess, and he took this woman and left with her. I heard him tell it many times, when he got to the border they wouldn't let him across and they had a case only before he could cross the border. These slaves they were his and the woman was mixed -- I cannot remember 50 years ago what she said."

This witness also said that her father taught her to write; that there was no school near; that she saw his handwriting and signature many times and was acquainted with the signature and would know it anywhere. She identified the signature on the letter from Lucian Fletcher to Francis (Exhibit 6) and the signature on the bottom of the second page of Exhibit 9 as those of her father, Lucian Fletcher.

Exhibit 7, a death certificate, shows that Francis A. Fletcher died January 1, 1932; that she was white and the widow of Lucian Fletcher; that she was born November 22, 1844.

One of the daughters, Lucy, was married first to [illegible] Hill, and afterward on April 25, 1901, to Stonewall Scott. The license to marry issued by the clerk of the circuit court of Rockbridge county, Virginia, shows that Lucy was then 19 years of age, which would indicate that she was born in 1882, eight years before the marriage of her father and mother. The evidence, however, shows that Lucian Fletcher, after the marriage recognized all these children of Frances Everett as his own.

We hold the evidence above recited (there being none to the contrary) makes out a prima facie case for these claimants.

The objectors, however, contend that Frances Brooker, Frank Briscoe (husband of a daughter of Lavonia Gorley) and Mrs. John L. Williams were interested witnesses within the definition of section 2, chapter 21 (11) of the [illegible] Code, [illegible]

that their testimony was properly disregarded by the trial court. They cite Laurence v. Laurence, 164 Ill. 367; In re Petition of Saunders, 245 Ill. App. 423. Neither Mrs. Williams nor Mrs. Briscoe would derive any immediate financial advantage from findings in favor of claimants. They were, therefore, not disqualified under the statute.

The persons who raise this objection should have shown that they had some standing to do so. They have not offered any evidence tending to show the qualifications required in this respect. Claimants say (plausibly) that section 8 of chapter 51 (Ill. State Bar Stats. 1935) makes section 2 inapplicable to proceedings of this nature. However that may be, by the weight of authority in this country, statutes such as this are not applicable to proceedings of this character (28 R. C. L. 510), although a minority of the courts hold a contrary view. See section 99 of the same authority. (28 R.C.L. 512.) It has been the general practice in the Probate courts of this State to receive the testimony of interested persons to establish the table of heirship of a deceased person. Indeed, such testimony is nearly always necessary in order to determine the facts.

The cases relied on by the objectors are distinguishable. In the Laurence case a colored woman claimed to be the wife of the deceased, a white man, and there was an issue between her and the heirs as to their rights in the property of the estate. In the Saunders case Dr. Saunders left a last will and testament in which his wife, Marian B., was named as executrix, and the will was admitted to probate. There was a proof of heirship, in which it was found that the deceased left him surviving Marian B., his widow, a son and several grandchildren. More than two years thereafter a woman "who styled herself as Grace M. Saunders" filed a petition, averring a marriage with the deceased almost 25 years before and

that their testimony was properly [illegible] by the trial court. They cite Lawrence v. Lawrence, 106 Ill. 607; [illegible] v. Saunders, 245 Ill. App. 423. Neither is [illegible] case would derive any immediate financial advantage from the judgment in favor of claimants. They were, therefore, not financially [illegible] under the statute.

The persons who raise this objection [illegible] that they had some standing to do so. They have not offered any evidence tending to show the qualifications required [illegible]. Claimants say (plausibly) that section 8 of [illegible] (Ill. Revised Stat. State. 1955) makes section 2 inapplicable [illegible] of this nature. However that may be, by the weight of authority in this country, statutes such as this are not applicable to proceedings of this character (28 R.C.L. 212), although a minority of the courts hold a contrary view. See section 22 of the [illegible] (28 R.C.L. 212.) It has been the general practice in [illegible] courts of this State to receive the testimony of interested persons to establish the table of heirship of a decedent [illegible]. Indeed, such testimony is nearly always the only [illegible] the facts.

The cases relied on by the [illegible] are distinguishable. In the Lawrence case a colored woman [illegible] of the deceased, a white man, and there was no [illegible] the heirs as to their rights in the property [illegible]. In the Saunders case Mr. Saunders left a [illegible] in which his wife, Marian S., was named as [illegible], [illegible] admitted to probate. There was a great [illegible], in which it was found that the deceased left his surviving [illegible], his widow, a son and several grandchildren. [illegible] the [illegible] a woman "who styled herself as Mrs. Saunders" filed a petition, averring a marriage with the deceased [illegible]

praying that the former order of heirship should be vacated. The Probate court dismissed the petition after a hearing. She appealed to the Circuit court where upon objection she was held to be an incompetent witness, and the Appellate court of the Second district upheld that contention. That proceeding was in its nature essentially different from this, in that the court was called upon to decide an issue of law and fact between the contending parties. In other words, that proceeding had the qualities of a law suit. This proceeding, so far as this record discloses, is only an inquisition. We think the court did not err in admitting the testimony and did err if, in deciding the case, the evidence of Mrs. Brammer and other witnesses was excluded upon the theory that they were incompetent witnesses. Indeed, no objection was made to much of Mrs. Brammer's testimony. As a matter of fact, the objectors cross-examined her at great length. Moreover, those seeking to interpose objections were without standing to do so. Brownlie v. Brownlie, 351 Ill. 72. Even excluding the testimony of Mrs. Brammer, we think the claimants made out a prima facie case.

It is next contended that the alleged declarations of Lucian Fletcher of Virginia were inadmissible in the absence of other proof of his relationship to Mary Turner, deceased. Jarchow v. Grosse, 257 Ill. 36, 100 N. E. 290, Anno. cases 1914 A 820, is relied on. The authorities cited sustain the rule contended for, with the modification that very slight evidence of such relationship is necessary. There are also authorities holding to the contrary.

Wigmore on Evidence, vol. 2, sec. 1491; Re Estate of Hartman, 157 Cal. 206; Re Clark, 13 Cal. App. 786; Sitler v. Gehr, 105 Pa. 592. Here there are circumstances in evidence dehors the declarations of Lucian Fletcher showing prima facie his relationship to the family of Maria Turner. There is the identity of the name of

praying that the former order of heirship should be vacated. The Probate court dismissed the petition after a hearing. The appealed to the Circuit court were upon objection one Ira Hall to be an incompetent witness, and the Appellate court of the second district upheld that contention. Just proceeding was in its nature essentially different from that, in that the court was called upon to decide an issue of law and fact between two contending parties. In other words, that proceeding had the qualities of a law suit. This proceeding, so far as this record discloses, is only an inquisition. We think the court did not err in admitting the testimony and did err if, in deciding the case, it rejected it. Brammer and other witnesses was excluded upon the theory that they were incompetent witnesses. Indeed, no objection was made to much of Mrs. Brammer's testimony. As a matter of fact, the objectors cross-examined her at great length. Moreover, there seeming to interpose objections were slit out claiming to do so. Brownlie v. Brownlie, 351 Ill. 72. Even excluding the testimony of Mrs. Brammer, we think the circuit made out a prima facie case.

It is next contended that the evidence of Lucian Fletcher of Virginia were inadmissible in the absence of better proof of his relationship to Mary Turner, deceased. Jackson v. Crosse, 257 Ill. 36, 100 N. E. 299, also. Here this a case, is relied on. The authorities cited must in the main be followed, with the modification that very slight evidence of such relationship is necessary. There are also authorities adhering to the contrary. Wigmore on Evidence, vol. 2, sec. 1461; In re Estate of Carlson 187 Cal. 208; Re Clark, 13 Cal. App. 734; Miller v. Cook, 105 Pa. 302. Here there are circumstances in evidence tending the declarations of Lucian Fletcher showing prima facie his relationship to the family of Maria Turner. There is the identity of the name of

Lucian Fletcher with the name of the husband of Mary Elizabeth Woodfork, the mother of Maria Turner, as shown by the assessment rolls and by memorials of transfers of real estate. The relationship was also shown by the testimony of the witnesses, Albert Venerable and Mamie Warner. There was also the fact that the deed of May 2, 1859, made in Canada indicates that Mary Elizabeth Fletcher was formerly of Lynchburg, Virginia, and the handwriting of Lucian Fletcher on Exhibit 9, a deed dated July 26, 1859, made in Canada, is identified as the handwriting of Lucian Fletcher of Lynchburg, Virginia. We think this evidence more than sufficient to comply with the rule as stated in Jarchow v. Grosse, 257 Ill. 36.

The objectors also contend that the admission of evidence, as to declarations by one spouse offered to prove the fact of marriage, in order to be admissible, must be made during the continuance of cohabitation of the parties; that otherwise such declarations are not contemporaneous with the main factto be proved and are not a part of the res gestae and therefore inadmissible. 18 R.C.L. 424; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N.S.) 190, and Gordon v. Gordon, 283 Ill. 182, are cited. On these authorities it is urged that the testimony of Mamie Warner as to admissions of the mother of Sarah Thornton, namely, Mary Elizabeth Fletcher, concerning her marriage at the Canadian border and the testimony of Mrs. Brammer and Frank Briscoe as to statements made by Lucian Fletcher and Frances Everett Fletcher were inadmissible because not made during the period of cohabitation. If this evidence had been offered on the theory that it was original evidence from which a presumption of marriage would arise, there would be merit in the contention. This evidence was not offered or received upon that theory. It was received as evidence admissible under the well recognized exception to the hearsay rule concerning proof of pedigree. The ground of its admission is necessity. This distinction

Lucian Fletcher with the name of the husband of Mary Elizabeth Woodfork, the mother of Marie Warner, as shown by the assessment rolls and by memoranda of transfers of real estate. The identity-ship was also shown by the testimony of the witnesses, Albert Venerable and Marie Warner. There was also the fact that the deed of May 2, 1889, made in Canada indicates that Mary Elizabeth Fletcher was formerly of Lynchburg, Virginia, and the marriage of Lucian Fletcher on Marilla v. a deed dated July 23, 1886, made in Canada, is identified as the marriage of Lucian Fletcher of Lynchburg, Virginia. We think this evidence was sufficient to comply with the rule as stated in Jackson v. Jackson, 187 Ill. 36.

The objectors also contend that the admission of evidence as to declarations by one spouse offered to prove the fact of marriage, in order to be admissible, must be made during the continuance of cohabitation of the parties; that otherwise such declarations are not contemporaneous with the fact to be proved and are not a part of the res gestae and in effect inadmissible. 12 R.C.L. 424; Dewey v. Dewey, 17 Wis. 103, 90 Am. St. 10, 1 L. R. A. (N.S.) 190, and Gordon v. Gordon, 22 Ill. App. 1, are cited. On these authorities it is argued that the testimony of Marie Warner as to admissions of the mother of Lucian Fletcher, namely, Mary Elizabeth Fletcher, concerning her marriage at the Indian border and the testimony of Mrs. Brewster and Frank Miller as to statements made by Lucian Fletcher and Frances Everett Fletcher are inadmissible because not made during the period of cohabitation. If this evidence had been offered on the theory that it was original evidence from which a presumption of marriage would arise, there would be merit in the contention. This evidence was not offered or received upon that theory. It was received as evidence of admissions under the well recognized exception to the hearsay rule concerning proof of pedigree. The ground of its admission is necessary. This exception

is pointed out in 18 R.C.L. 424. The rule in Illinois is stated in Sugrue v. Crilley, 329 Ill. 458:

"Pedigree may be proved by hearsay evidence, but it seems to be well settled that a declaration concerning kinship reproduced as hearsay, to be admissible, must have been made by a person, since deceased, before a controversy arose, and who was related by blood or affinity to some branch of the family the pedigree respecting which is in question. (Jarchow v. Grosse, 257 Ill. 36; Aalholm v. People, 211 N. Y. 406, L.R. A. 1915-D, 215.)"

Other cases in which the rule has been applied are Welch v. Worsley, 330 Ill. 172; Estate of Healea v. Healea, 254 Ill. App. 334.

The evidence in this record is very far from being all that we would desire, but it is the best obtainable. The parties objecting offer no evidence at all. This evidence notwithstanding its apparent inconsistencies, upon the whole tends to show the marriage of Lucian Fletcher to Mary Elizabeth Woodfork, a colored slave woman, and that Lucian Fletcher of Virginia, husband of Frances Everett, is the same Lucian Fletcher who married Mary Elizabeth Woodfork and lived with her and their children in Windsor, Canada, and was the father of Maria Fletcher Turner. It follows that these claimants are the only heirs at law and next of kin of Maria Turner.

It is, however, contended with great earnestness that since Mary Elizabeth Woodfork was a slave and colored and Lucian Fletcher of Virginia, her master, was white, there could be no lawful marriage between them; that such marriage was absolutely void as contrary to public policy in Virginia, Michigan and Illinois, as well as in some other States. The statutes of these States, as they existed during the period in question, show that such was the law at the time of this marriage. Code of Virginia, 1849, chap. 196, p. 740, secs. 8, 9; Compiled Laws of Michigan, 1857, vol. 2, p. 107, and par. 3209, p. 950; Illinois Statutes of 1858, Scates Treat & Blackwell Marriages, p. 579, sec. 2, pp. 820-823, sec. 17,

is pointed out in 13 a.d.u. 444. The case in Illinois is stated in Greene v. Griffey, 329 Ill. 458:

> "Pedigree may be proved by hearsay evidence, but it seems to be well settled that a declaration concerning a family relationship made by a person, since deceased, before a controversy arose, and who was related by blood or affinity to some branch of the family, are pedigree respecting which is in question. (Jackson v. Jones, 257 Ill. 36; Ashcroft v. People, 11 . . . 400, . . . 1 . . . 2d, 216.)"

Other cases in which the rule has been applied are Kelsey v. Morley, 350 Ill. 172; Estate of Hoales v. Hoales, 329 Ill. 4p. 324.

The evidence in this record is very far from being all that we would desire, but it is the best obtainable. The courts of-fering offer no evidence at all. This evidence notwithstanding its apparent inconsistencies, upon the whole tends to show the marriage of Indian Fletcher to Mary Elizabeth Woodfork, a colored slave woman, and that Indian Fletcher of Virginia, husband of Frances Everett, is the same Indian Fletcher who married Mary Elizabeth Woodfork and lived with her and their children in Windsor, Canada, and was the father of Amelia Fletcher Turner. It follows that these claimants are the only living children and next of kin of Maria Turner.

It is, however, contended with great earnestness that since Mary Elizabeth Woodfork was a slave and colored and Indian Fletcher of Virginia, her master, was white, there could be no lawful mar-riage between them; that such marriage was absolutely void as con-trary to public policy in Virginia, although and in fact, as well as in some other States. The statutes of those at such, as they existed during the period in question, show that such was the law at the time of this marriage. Code of Virginia, 1860, chap. 109, p. 740, secs. 8, 9; Compiled Laws of Florida, 1857, vol. 2, p. 107, and par. 3209, p. 930; Illinois statutes of 1829, Scates Treat & Blackwell Marriages, p. 379, sec. 3, pp. 382-383, sec. 17,

p. 824, sec. 23, Constitution of 1848, sec. 14, p. 74.

Without undertaking to discuss in detail merely technical points, it will be sufficient to say that by the Fifteenth Amendment to the Constitution of the United States slavery was abolished before the death of Lucian Fletcher and before the death of Mary Elizabeth Fletcher. Moreover, by the statute of Illinois marriages of this kind have since been validated, and the issue thereof made legitimate. See Illinois State Bar Stats., 1935, chap. 89, par. 19. We have already stated that the fair inference from the evidence is that the marriage in question took place in the Dominion of Canada and not in the United States. If objectors desired to show that the marriage was in fact invalid in the jurisdiction where it took place, the burden of proof was upon them to produce such evidence, as well as to produce evidence which would show their own standing to make objection. Mary Elizabeth Woodfork was not a slave within the jurisdiction of Canada, and the impediment was removed when she crossed the border and came into the jurisdiction where slavery was illegal. It has also been held by the courts construing the remedial Illinois statute above cited that unless a slave marriage has been disaffirmed, it is as binding as if the parties had been free. Middleton v. Middleton, 221 Ill. 623; Prescott v. Ayers, 276 Ill. 242. Neither of these parties ever disaffirmed the marriage so far as the evidence discloses. It is true that shortly after his release from imprisonment at the end of the Civil war, Lucian Fletcher began illicit relations with Frances Everett, but these relations were not matrimonial until some years after the death of Elizabeth Fletcher at Windsor. Not until 1880 was he married to Frances Everett in Virginia.

We have, at the cost of considerable labor, considered the evidence and legal questions raised by these objectors on this voluminous record. We might have declined to do so, because, as

p. 824, sec. 23, Constitution of 1818, sec. 1, n. 7.

Without undertaking to discuss in detail merely technical points, it will be sufficient to say that by the adoption of amendment to the Constitution of the United States slavery was abolished before the death of Lucian Fletcher and before the death of Mary Elizabeth Fletcher. Moreover, by the statute of Illinois marriages of this kind have since been validated, and the issue thereof made legitimate. See Illinois State Bar Stats., 1878, chap. 3, part, 19. We have already stated that the fact i [illegible] evidence is that the marriage in question took place in the dominion of Canada and not in the United States. If objectors desired to show that the marriage was in fact invalid in the jurisdiction where it took place, the burden of proof was upon them to produce such evidence, as well as to produce evidence which would show their own standing to make objection. Mary Elizabeth Woodbury was not a slave within the jurisdiction of Canada, and the instrument was removed when she crossed the border and came into the jurisdiction where slavery was illegal. It has also been held by the courts construing the remedial Illinois statute above cited that unless a slave marriage has been disaffirmed, it is [illegible] as if the parties had been free. Hildreth v. Hildreth, [illegible] Ill. 489; Prescott v. Ayers, 276 Ill. 362. Matters of [illegible] courts over disaffirmed the marriage so far as the evidence discloses. It is true that shortly after his release from [illegible] at the end of the Civil War, Lucian Fletcher began illicit relations with Frances Everett, but these relations were not held out until some years after the death of Elizabeth Fletcher at Indian. Not until 1880 was he married to Frances Everett in Virginia.

We have, at the cost of considerable labor, considered the evidence and legal questions raised by these objectors on this voluminous record. We might have declined to do so, reasons, as

a matter of fact, there is nothing in the record tending to show that the objectors have any interest in the proceeding that would give them any right to be heard. In the Probate and Circuit courts they should have been required to make preliminary showing of such interest. Matters of this importance should not be tried piecemeal, as such method makes much unnecessary work for the courts and tends to prevent the attainment of that finality in litigation which is required by the public interest.

The judgment of the Circuit court is reversed and the proceedings remanded to that court, with directions to enter an order finding claimants to be the heirs at law and next of kin of Maria Turner and to duly certify such order to the Probate court of Cook county.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

a matter of fact, there is nothing in the record [illegible] to show that the objectors have any interest in the proceeding that would give them any right to be heard. In the [illegible] counts they should have been required to [illegible] of such interest. Matters of this import [illegible] be tried piecemeal, as such method makes [illegible] for the courts and tends to prevent the attainment [illegible] in litigation which is required by the [illegible].

The judgment of the circuit court [illegible] proceedings remanded to that court, with [illegible] order finding claimants to be the heirs at [illegible] of Martin Turner and to duly certify such order to the [illegible] of Cook county.

REVERSED AND REMANDED [illegible].

McMurray, P. J., and O'Connor, J., concur.

38730

HERCULES NOVELTY CO., INC.,
a Corporation,
Appellee,

vs.

LIGHTNER PUBLISHING CORPORATION,
a Corporation, and CARROLL E.
VETTERICK,
Appellants.

64 H

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

285 I.A. 590

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

October 20, 1932, plaintiff corporation sued defendant corporation, publisher of a magazine called the "Automatic Age," and Vetterick, its manager, alleging the publication by them of an alleged libel, as follows:

"Editor's Note: AUTOMATIC AGE has refused to accept the advertising of Hercules Novelty Company for some time, although we see it running in chisler magazines. They have not shown the least good faith and should not be allowed to continue to gyp the industry."

Damages were demanded to the amount of $50,000. Defendants filed pleas, to which plaintiff demurred. The demurrer was sustained. Defendants then filed a plea of not guilty, with special pleas, setting up that the publication was privileged and justified. Plaintiff joined issue on the plea of not guilty and moved to strike other of the pleas and filed a demurrer to plea No. 4. The motion to strike was not pressed, and plaintiff thereafter filed a demurrer to all the special pleas.

When the cause came on for trial this demurrer of plaintiff was undisposed of, and the court, without making any record disposing of the demurrer, caused a jury to be impanelled. Counsel made opening statements to the jury, defendants' counsel, among other things, stating that he would prove the alleged libel to be true. After consultation in chambers, as a statement of the trial Judge indicates, the jury was withdrawn and the cause submitted to the court. Defendant manager was not present in court. No witnesses appeared in defendants' behalf. An affidavit afterward

HERCULES NOVELTY CO., INC.,
a Corporation,
Appellee,

vs.

LIGHTNER PUBLISHING CORPORATION,
a Corporation, and DARNOLL E.
VETTERICK,
Appellants.

[illegible] NEW SUPERIOR COURT
OF COOK COUNTY.

[illegible]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

October 20, 1932, plaintiff [illegible] corporation, publisher of a magazine [illegible] and Vetterick, its manager, [illegible] an alleged libel, as follows:

"Editor's Note: [illegible] advertising of Hercules Novelty Company [illegible] we see it running in similar magazines. [illegible] least good faith and should not be [illegible] industry."

Damages were demanded to the amount of [illegible] places, to which plaintiff demurred. [illegible] Defendants then filed a plea of [illegible] setting up that the publication [illegible] Plaintiff joined issue on the [illegible] strike either of the pleas and filed a [illegible] motion to strike was not granted, and [illegible] filed a demurrer to all the special pleas.

When the cause came on for trial [illegible] tiff was undisposed of, [illegible] court, without making any record disposing of the demurrer, [illegible] made opening statements to a jury, [illegible] other things, stating that he would prove the alleged libel to be true. After consultation in chambers, as a statement of the trial judge indicates, the jury was withdrawn and the cause submitted to the court. Defendant manager was not present in court. To wit-

submitted is to the effect that they did not know the cause was to be tried at that time. Their attorney, however, was present. The evidence for plaintiff was submitted, and the court at the close of plaintiff's evidence made a finding for plaintiff, assessed damages in the sum of $1500 and entered judgment on the finding. After a motion to set aside the judgment and for leave to defend, supported by affidavit, was denied, defendants gave notice of this appeal.

They contend, in the first place, that it was error for the court to try the cause without first disposing of the demurrer of plaintiff to defendants' pleas, and it must be conceded that such practice was unusual and irregular. It was so held in Hopkins v. Woodward, 75 Ill. 62, although the court there was of the opinion that the error was not reversible, because the plea was in fact bad. There was a dissenting opinion upon the theory that the irregularity constituted reversible error. Plaintiff here does not contend that the pleas were in fact bad, but argues that the inference from facts recited in the record is that the demurrer was sustained by the court prior to the trial. Plaintiff says that if it was not, defendants waived their right to have judgment on the demurrer by going to trial without objection, citing Devine v. Chicago City Ry. Co., 237 Ill. 278. This would be a valid argument if judgment had been against plaintiff and, it appealing, would so argue; but this demurrer was that of plaintiff, challenging the merits of the pleas of defendants. Defendants by going to trial did not waive their rights under good and sufficient pleas. Whether the cause was tried erroneously without determination of the quality of the pleas, as defendants contend, or the pleas held bad, as plaintiff argues, defendants have a right on the record, as we understand it, to contend in this court that the pleas were meritorious and that it was error either to sustain a demurrer to them or to

submitted in to the effect that they did not [illegible] was to be tried at that time. Their attorney, however, [illegible] pleaded. The evidence for plaintiff was submitted, and the [illegible] close of plaintiff's evidence made a finding for plaintiff, assessed damages in the sum of $150 [illegible] ing. After a motion to set aside the judgment [illegible] denied, supported by affidavit, was denied, defendants gave notice of this appeal.

They contend, in the first place, that it was error for the court to try the cause without first disposing of the demurrer of plaintiff to defendants' pleas, and it must be [illegible] such practice was unusual and irregular. It was so held in Quinn v. Woodward, 75 Ill. 82, although the court there was of the opinion that the error was not reversible, because the pleas in fact had. There was a dissenting opinion upon the [illegible] that the irregularity constituted reversible error. Plaintiff here does not contend that the pleas were in fact good, but [illegible] that the inference from facts recited in the record is that the demurrer was sustained by the court prior to the trial. Plaintiff says that if it was not, defendants waived their right to have judgment on the demurrer by going to trial without objection, citing Levine v. Chicago City Ry. Co., 237 Ill. 272. This would be a valid argument if judgment had been against plaintiff and, it appearing, would so argue; but this demurrer was that of plaintiff, challenging the merits of the pleas of defendants. Defendants by going to trial did not waive their rights under good and sufficient pleas. Whether the cause was tried erroneously without determination of the quality of the pleas, as defendants contend, or the pleas held bad, as plaintiff argues, defendants have a right on the record, as we understand it, to contend in this court that the pleas were meritorious and that it was error either to sustain a demurrer to them or to

entirely ignore them. Defendants argue the pleas were meritorious, and we do not understand plaintiff contends to the contrary. If, as plaintiff contends, there was an order sustaining a demurrer to the pleas and the pleas were in fact good, defendants are not precluded from arguing that question here by reason of omission on their part to have an order entered to the effect that they elected to stand by the pleas. This is the rule stated in Jocelyn v. White, 201 Ill. 16, followed and approved in the recent case of Roney v. Chicago Title & Trust Co., 354 Ill. 144. The case of Devine v. Chicago City Ry. Co., 237 Ill. 278, on which plaintiff relies, is not contrary, as above explained.

The demurrer admitted all facts well pleaded. These pleas show that the alleged libel was printed on a page of the magazine devoted to complaints by defendants' customers; that on the same page appeared letters from these customers, which, if true, would have justified the alleged libelous statement, which, as a matter of fact, was only an editor's note attached to these statements. It was manifestly unfair to admit in evidence a part of the printed statement without the context. The whole matter should have been before the courtin order that it might have been informed on the questions of malice and good faith so far as defendants were concerned. The court could not properly pass on these questions or justly determine the amount of damages without such information. If we assume the innuendoes stated in the declaration to be true, the article in question was, as plaintiff contends, libelous per se, but on the question of malice and damages the whole article should have been considered.

One of the pleas as amended affirmed that plaintiff, as a matter of fact, did "gyp" the industry, and charged that plaintiff dealt in coin vending machines of a kind that could readily and easily be changed into gambling devices prohibited by law, and that

entirely ignore them. Defendants argue [illegible] verifications, and we do not understand plaintiff contends to the contrary. If, as plaintiff contends, there was an order [illegible] demurrer to the pleas and the pleas were in fact good, defendants are not prejudiced from arguing that plaintiff erroneously [illegible] on their part to have an order entered to the effect that they elected to stand by the pleas. This is the rule stated in Jenkins v. White, 201 Ill. 16, followed and approved in the recent case of Owen v. Chicago Title & Trust Co., 384 Ill. 114. The case of Devine v. Chicago City Ry. Co., 247 Ill. 278, on which plaintiff relies, is not contrary, as above explained.

The demurrer admitted all facts well pleaded. These pleas show that the alleged libel was printed on a page of the magazine devoted to complaints by defendants' patrons; that on the same page appeared letters from these customers, which, if true, would have justified the alleged libelous statement, which, as a matter of fact, was only an editor's note attached to those statements. It was manifestly unfair to admit in evidence a part of the printed statement without the context. The whole matter should have been before the court in order that it might have been informed on the questions of malice and good faith so far as defendants were concerned. The court could not properly pass on these questions or justly determine the amount of damages without such information. If we assume the innuendoes stated in the declaration to be true, the article in question was, as plaintiff contends, libelous per se, but on the question of malice and damages the whole [illegible] should have been considered.

One of the pleas as amended alleged that in fact, as a matter of fact, did "say" the industry, and charged that plaintiff dealt in coin vending machines of a kind that could readily and easily be changed into gambling devices prohibited by law, and that

in thinly veiled language plaintiff in its advertisements described the simple manipulation required to that end. An amendment to an amended plea alleged "that the advertisement mentioned in said amended plea described two automatic pay-offs and that the jack-pot in the front can be disconnected and the hidden jack-pot in the rear would then be in operation and that both jack-pots can be done away with in a jiffy and the said machine can then be operated with or without a a pay-off card." We think the pleas were in substance meritorious.

We also hold that the damages allowed in this case are so excessive as to compel a reversal. The evidence in this respect is purely speculative. There is no proof of the number of subscribers to the paper published by defendants. There is no proof that plaintiff lost a single customer as a result of the publication of this article. Indeed, the excerpt from a single page of the magazine appears to have been admitted in evidence without any preliminary proof of its publication. There is no evidence of the wealth of defendants such as would justify an award of large punitive damages. In the absence of evidence of the financial worth of a defendant the courts have held that a jury has no right to give any more damages than it would if it affirmatively appeared that the defendant was without pecuniary resources at all. Beesom v. Gossard, 167 Ill. App. 561; Mercy v. Talbot, 189 Ill. App. 1.

Plaintiff is a corporation, incorporated in 1930 with a capital stock of $5000. As was develpped on cross examination of its accountant, in 1930 it operated at a net loss of $1104.66; in 1931 it made a net profit of $2534.09; in 1932 a net loss of $1314.44; in the first half of 1933 there was a net loss of $1622.34. There is no evidence in the record which would justify a judgment for the amount rendered in this case, and we think the

in thinly veiled language plaintiff is [illegible] criticed the simple manipulation required [illegible] to an amended plea alleged "that the advertisements [illegible] said amended plea described two mechanical pay-offs [illegible] jack-pot in the front can be [illegible] in the rear would then be in operation [illegible] can be done away with in a jiffy [illegible] operated with or without a pay-off [illegible] were in substance verifications.

We also hold that the [illegible] excessive as to compel a reversal. [illegible] is purely speculative. There is no proof [illegible] scribers to the paper published by [illegible] that plaintiff lost a single customer [illegible] tion of this article. Indeed, the exact [illegible] the magazine appears to have been [illegible] any preliminary proof of its position. [illegible] wealth of defendants when as would justify [illegible] punitive damages. In the absence of evidence [illegible] worth of a defendant the courts have [illegible] to give any more damages than it would [illegible] that the defendant was [illegible] Coleman v. Doubleday, 187 Ill. App. 521; Ferguson [illegible]

Plaintiff is a corporation, under [illegible] capital stock of $5000. As was developed on cross [illegible] its accountant, in 1910 it operated at a [illegible]; in 1921 it made a net profit of $2586.09; in 1922 a net loss of $1314.44; in the first half of 1924 there was a net loss of $1622.04. There is no evidence in the record which would justify a judgment for the amount rendered in this case, and we find the

court, in the exercise of its discretion, should have granted the motion of defendants for a rehearing in the cause.

For these reasons the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

court, in the exercise of its discretion, should have granted the motion of defendants for a rehearing in the cause.

For these reasons the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

38486

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL., STERLING CLEANERS & DYERS, INC., a corporation, et al.,

Petitioners,

v.

THE CIRCUIT COURT OF COOK COUNTY AND BENJAMIN P. EPSTEIN, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY,

Respondents.

ORIGINAL BILL FILED BY PETITIONERS FOR WRIT OF PROHIBITION IN APPELLATE COURT OF ILLINOIS FIRST DISTRICT.

285 I.A. 590

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon an original petition filed by the People of the State of Illinois on relation of the Sterling Cleaners & Dyers, Inc., a corporation, et al. against the Circuit Court of Cook County, and Benjamin P. Epstein, Judge of the Circuit Court of the Circuit Court of Cook County, praying that a writ of prohibition issue against the respondents. The petition filed herein, among other things, alleges that on July 13, 1935, in the Circuit Court of Cook County there was entered a final decree entitled Cleaning and Dyeing Plant Owners Association of Chicago, a corporation, plaintiffs v. Sterling Cleaners & Dyers, Inc., et al., defendants, from which final decree it appears substantially that upon the answers being filed to the complaint of the plaintiffs by the defendants, the cause having been referred to a Master in Chancery and upon the report of the Master and exceptions to the Master's report, the court entered certain specific findings and ordered as a part of its decree:

> " (2) That all parties hereto, both plaintiffs and defendants, and each of them, and their officers, either in their individual capacity or acting for or on behalf of said corporation or any other corporation, their agents, attorneys, solicitors or employees, and all associations, firms or persons acting in concert with, assisting or aiding, confederating or conspiring with them or either of them, be and they and each of them are hereby permanently Enjoined and Restrained of and from:

38488

THE PEOPLE OF THE STATE OF ILLINOIS,
EX REL., STERLING OIL ME & DYERS,
INC., a corporation, et al.,

Petitioners,

v.

THE CIRCUIT COURT OF COOK COUNTY AND
BENJAMIN F. ZESTEIN, JUDGE OF THE
CIRCUIT COURT OF COOK COUNTY,

Respondents.

MR. JUSTICE REEDY DELIVERED THE OPINION OF THE COURT:

This cause is in this court upon a petition filed by the people of the State of Illinois on relation of the petitioners Cleaners & Dyers, Inc., a corporation, et al., against the Circuit Court of Cook County, and Benjamin F. Zestein, Judge of the Circuit Court of the Circuit Court of Cook County, praying that a writ of prohibition issue against the respondents. The petition filed, among other things, alleges that on July 18, 1955, in the Circuit Court of Cook County there was entered a final decree entitled Cleaning and Dyeing Plant Owners Association of Illinois, a corporation, plaintiffs v. Sterling Cleaners & Dyers, Inc., et al., defendants, from which final decree it appears that certain appeals upon the answers being filed to the complaint were duly perfected by the defendants, the cause having been duly docketed in the Appellate and upon the report of the master and exceptions to the master's report, the court entered certain about 18 findings and entered as part of its decree:

" (2) That all parties hereto, both plaintiffs and defendants, and each of them, and their officers, either in their individual capacity or acting for or on behalf of said corporation or any other corporation, their agents, attorneys, solicitors or employees, and all associations, firms or persons acting in concert with, assisting or aiding, confederating or conspiring with them or either of them, be and they and each of them are hereby permanently enjoined and restrained of and from

(a) Selling, offering for sale, rendering or offering to render at retail, cleaning and pressing services below cost. Selling, offering for sale, rendering or offering to render at retail, cleaning and pressing services, for men's and women's garments at a price less than seventy-five (75¢) cents per garment, for cash and carry, and less than ninety (90¢) cents per garment, called for and delivered.

Selling, offering for sale, rendering or offering to render at wholesale, cleaning services for men's suits, unfinished, or as is commonly referred to in the trade as 'x' work, at less than fifty (50%) per cent of the cash and carry price as set forth herein.

Selling, offering for sale, rendering or offering to render at wholesale, cleaning and pressing, or as is commonly referred to in the trade as finished work, Ladies' dresses at less than sixty (60%) per cent, of the retail cash and carry price as set forth herein.

(b) Advertising in any publication, newspaper, periodical, by signs, on wagons, signs on windows, signs on trucks, through the radio, verbal solicitations, through the use of circulars, handbills, billboards, or from making known in any other manner that the cleaning and pressing services as above set forth in paragraph (a) will be rendered at prices below those designated in said paragraph (a) hereof."

And also from

"(g) Engaging in the conspiracy or combination in the cleaning business for the purpose or with the effect of destroying, injuring, or damaging the plaintiffs, or any or either of them by the doing of the acts herein restrained.

(h) Singly, or collectively engaging in unfair competition or unfair trade practices in the cleaning and dyeing industry in Cook County, as set forth in the paragraphs* * *."

It appears from the petition that there is pending in the Appellate Court of Illinois, for the First District, an appeal from this decree entered by the Circuit Court, and that together with the notice of appeal by the relators, Sterling Cleaners & Dyers, Inc., et al, a $5,000 bond was approved by the court below and filed in the office of the Clerk of the Circuit Court, with the Fidelity and Casualty Co. of New York as surety.

It further appears from the petition that after the approval and filing of the bond, the relators did, after July 19, 1935, continue to render cleaning and pressing service and advertise the same at the

(a) Selling, offering for sale, rendering or offering to render at retail, cleaning and pressing garments which cost. Selling, offering for sale, rendering or offering to render at retail, cleaning and pressing garments, for men's and women's garments at a price less than twenty-five (25¢) cents per garment, for cash and carry, and less than ninety (90¢) cents per garment, called for and delivered.

Selling, offering for sale, rendering or offering to render at wholesale, cleaning and pressing for men's and furnished, or as is commonly referred to in the trade as finished work, 'x' work, at less than fifty (50¢) per cent of the cash and carry price as set forth herein.

Selling, offering for sale, rendering or offering to render at wholesale, cleaning and pressing, or as is commonly referred to in the trade as finished work, finished dresses at less than sixty (60¢) per cent, of the cash and carry price as set forth herein.

(b) Advertising in any publication, newspaper, periodical, by signs, on wagons, signs on windows, signs on trucks, through the radio, verbal solicitations, through the use of circulars, handbills, billboards, or from selling known in any other manner that the cleaning and pressing services as above set forth in paragraph (a) will be rendered at prices below those designated in said paragraph (a) hereof.

And also from

"(c) Engaging in the conspiracy or combination in the cleaning business for the purpose or with the effect of destroying, injuring, or damaging the plaintiffs, or any or either of them by the doing of the acts herein mentioned.

(d) Singly, or collectively engaging in unfair competition or unfair trade practices in the cleaning and dyeing industry in Cook County, as set forth in the complaint."

It appears from the petition that a [illegible] in the Appellate Court of Illinois, [illegible] District, on appeal from this decree entered by the Circuit Court, and that together with the notice of appeal by the relators, [illegible] Dyeing Machine Co., Inc. et al, a $5,000 bond was approved by the trial judge [illegible] in the office of the clerk of the circuit court, with the [illegible] Casualty Co. of New York as surety.

It further appears from the petition that after the removal and filing of the bond, the relators on, as of July 13, 1938, continue to render cleaning and pressing service and advertise the same at the

same prices they did prior to the entry of the decree; that pursuant to a petition for rule to show cause, Edward A. Fink, one of the relators, was on July 27, 1935, adjudged guilty of contempt of court and sentenced to the County Jail of Cook County, for a period of sixty days; that on August 2, 1935, the Peacock Cleaners and Dyers Ltd., a corporation, one of the relators, was adjudged guilty of contempt of court for violating the injunctional order of the decree of July 13, 1935, and fined $3,000. From these orders appeals are now pending in the Appellate Court for the First District. There were further petitions pending against certain named relators for alleged violation of the injunctional order entered on July 13, 1935, and continued to September 3, 1935, before Benjamin P. Epstein, one of the Judges of the Circuit Court. It also appears that on August 8, 1935, the plaintiffs in the original proceeding filed further petitions to hold Edward A. Fink, Peacock Cleaners and Dyers, Ltd., a corporation, and some fifty employees of the corporation in contempt for a violation of said injunctional order entered on July 13, 1935, which proceeding was continued to September 3, 1935, by the respondent Benjamin P. Epstein, one of the Judges of the Circuit Court of Cook County. The respondents filed an answer to the petition, and from this answer it is apparent that the facts are substantially admitted as set forth in the petition of the relators, and the question involved in this proceeding is whether under the facts in the record the respondents must obey the injunction provided for in the decree, where on appeal a supersedeas shall operate upon the filing of an appeal bond, as provided for by the Civil Practice Act, Ch. 110 Sec. 82, Par. 210, as follows:

> "An appeal to the Appellate or Supreme Court shall operate as a <u>supersedeas</u> only if and when the appellant, after notice duly served, shall give and file a bond in a reasonable amount, to secure the adverse party. If the bond is given before the record is filed in the reviewing court, the

same prices they did prior to the entry of the decree; that pursuant to a petition for rule to show cause, Edward A. Fink, one of the relators, was on July 27, 1955, adjudged guilty of contempt of court and sentenced to the County Jail of Cook County, for a period of sixty days; that on August 5, 1955, the Peacock Cleaners and Dyers Ltd., a corporation, one of the relators, was adjudged guilty of contempt of court for violating the injunctional mandate of the decree of July 13, 1955, and fined $1,000. From these orders relators are now pending in the Appellate Court for the First District. There were further petitions pending against certain named relators for alleged violation of the injunctional order entered on July 13, 1955, and continued to September 3, 1955, before Benjamin P. Epstein, one of the judges of the Circuit Court. It also appears that on August 8, 1955, the plaintiffs in the original proceeding filed further petitions to hold Edward A. Fink, Peacock Cleaners and Dyers, Ltd., a corporation, and some fifty employees of the corporation in contempt for a violation of said injunctional order entered on July 13, 1955, which proceeding was continued to September 2, 1955, by the respondent Benjamin P. Epstein, one of the judges of the Circuit Court of Cook County. The respondents filed an answer to the petition, and from this answer it is apparent that the facts are substantially admitted as set forth in the petition of the relators, and the question involved in this proceeding is whether under the facts in the record the respondents must obey the injunction provided for in the decree, where an appeal is superseded only upon the filing of an appeal bond, as provided for by the Civil Practice Act, Ch. 110 Sec. 82, par. 110, as follows:

> "An appeal to the Appellate or Supreme Court shall operate as a supersedeas only if and when the appellant, after notice duly served, shall give and file a bond in a reasonable amount, to secure the appellee partly. If the bond is given before the record is filed in the reviewing court, the

amount and terms thereof shall be fixed and the security approved by the trial judge or his successor in office, or where this is impossible because of the absence from the district, sickness or other disability of such judge then by any other judge of said court, and the bond shall be fixed in said court. If the appeal is from a judgment or decree for the recovery of money, the condition of the bond shall be for the prosecution of such appeal and the payment of the judgment, interest, damages and costs in case the judgment is affirmed. In all other cases the condition shall be directed by the court with reference to the character of the judgment, order or decree appealed from."

It will not be necessary for this court to determine whether or not the trial court was empowered to consider the question of the violation of the injunction decreed by the court, or the related questions presented by the parties to this action as to the power of this court to issue a writ of prohibition against the respondents. This court has considered the original case here on appeal entitled, Cleaning and Dyeing Plant Owners Association of Chicago, a Corporation, Plaintiffs (Appellees) v. Sterling Cleaners & Dyers Inc., et al, Defendants (Appellants), No. 38486, which is the basis of this proceeding, and has reversed that case. Therefore the subject matter relating to the instant case is disposed of and it will not be necessary to consider the merits thereof, and this proceeding is accordingly dismissed.

SUIT DISMISSED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

amount and terms thereof shall be fixed and the security approved by the trial judge or his successor in office, or where this is impossible because of the absence from the district, sickness or other disability of such judge, then by any other judge of said court, and the bond as so fixed in said court. If the [illegible] judgment or decree for the recovery of money, the condition of the bond shall be for the prosecution of such [illegible] the payment of the judgment, interest, costs and damages in case the judgment is affirmed. In all [illegible] the condition shall be directed by the court with reference to the character of the judgment, order or decree [illegible] from."

It will not be necessary for this court to [illegible] whether or not the trial court's [illegible] to [illegible] the construction of the violation of the injunction [illegible] the court, or the related questions presented by the [illegible] to this section of the power of this court to issue a writ of [illegible] against the respondents. This court has considered the original [illegible] here on appeal entitled, Glenning and Wesley Place [illegible] Officers, a Corporation, Plaintiffs (Appellees) v. [illegible] & Dyers Inc., et al, Defendants (Appellants), No. [illegible], which is the basis of this proceeding, and [illegible]. Therefore the subject matter relating to [illegible] of and it will not be necessary to consider the [illegible], and this proceeding is accordingly dismissed.

[illegible]

HALE, P.J. AND DENIS P. SULLIVAN, J., CONCUR.

38496

CLEANING & DYEING PLANT OWNERS ASSOCIATION OF CHICAGO, a Corporation not for profit, et al, Plaintiffs (Appellees), v. EDWARD A. FINK, and PEACOCK CLEANERS & DYERS, LTD., a Corporation, Defendants (Appellants).	APPEAL FROM CIRCUIT COURT COOK COUNTY.

285 I.A. 590

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is in this court from an order of the Circuit Court of Cook County entered on July 26, 1935, finding the respondent Edward A. Fink guilty of contempt of court for violation of the decree of the Circuit Court of Cook County entered on July 13, 1935. There is also a like appeal by the respondent Peacock Cleaners & Dyers, Ltd., a corporation, from a like order entered on August 2, 1935, finding this respondent guilty of contempt for violation of the decree entered by the court on July 13, 1935. Upon an order entered in the Appellate Court of Illinois, First District, these appeals were consolidated for hearing.

The court entered a final decree on July 13, 1935 in the cause then pending, wherein all parties to said proceeding, both plaintiffs and defendants, were permanently enjoined and restrained, among other things, from selling, offering for sale, rendering or offering to render at retail cleaning and pressing for men's and women's garments at less than 75 cents per garment for cash and carry, and less than 90 cents per garment called for and delivered, and from selling, offering for sale, rendering

38R96

OL ANIWW & DYEING PLANT WORKS ASSOCIATION OF CHICAGO, a Corporation not for profit, et al.,	
Plaintiffs (Appellees),	
v.	
EDWARD A. HINK, and PEACOCK CLEANERS & DYERS, LTD., a Corporation,	
Defendants (Appellants).	

AGAIN NEW

CIRCUIT COURT

COOK COUNTY.

SEPARATE

MR. JUSTICE MERCER DELIVERED THE OPINION OF THE COURT.

This appeal is in the form of a writ from an order of the Circuit Court of Cook County entered on July 26, 1938, finding the respondent guilty of contempt of court for violation of the decree of the Circuit Court of Cook County entered on July 12, 1938. There is also a like appeal by the respondent Peacock Cleaners & Dyers, Ltd., a corporation, from a like order entered on August 2, 1938, finding this respondent guilty of contempt for violation of the decree entered by the court on July 12, 1938. Upon an order entered in the Appellate Court of Illinois, First District, these appeals were consolidated for hearing.

The court entered a final decree on July 12, 1938 in the cause then pending, wherein all parties to said proceeding, both plaintiffs and defendants, were permanently enjoined and restrained, among other things, from selling, offering for sale, rendering or offering to render at retail cleaning and pressing for men's and women's garments at less than 75 cents per garment for cash and carry, and less than 90 cents per garment called for and delivered, and from selling, offering for sale, rendering

or offering for sale at wholesale cleaning services for men's suits, unfinished, or as commonly referred to in the trade as "x" work, at less than 50 per cent of the cash and carry price, and of ladies' dresses at less than 60 per cent of the retail cash and carry price, as provided in said decree, and further restraining them from advertising in any form that they would render cleaning and pressing service at prices below those designated in the decree.

The respondent Peacock Cleaners & Dyers, Ltd., together with the other defendants named, appealed from the decree and perfected an appeal to this court, as provided for by law, by presenting their supersedeas bond in the penal sum of $5,000 with surety, which was filed and approved in the Circuit Court of Cook County, Illinois.

The respondent Edward A. Fink was not named as a party to the original cause, nor named in the decree entered on July 13, 1935, although he was and is the president of Peacock Cleaners & Dyers, Ltd., one of the defendants.

During the pendency of the appeal in this court, as above stated, the plaintiffs in the cause did on July 24, 1935, file a petition as amended upon notice for a rule upon the respondents to show cause why the respondents should not be held in contempt of the Circuit Court of Cook County for an alleged violation of the decretal order entered on July 13, 1935, in rendering cleaning and pressing service of men's and women's garments below the prices set forth in said decretal order and in advertising their said services and prices in manner allegedly contrary to the provisions of said decree.

or offering for a le et work to clean, services for men's suits, unlinished, or as commonly referred to in the trade "x" work, at less than 50 per cent of the cash and carry price, and of ladies' dresses at less than 30 per cent of the regular cash and carry price, as provided in said decree, in further restraining them from advertising in any fashion that they would render cleaning and pressing services at prices below the designated in the decree.

The respondent Geocos Ole [illegible], Ltd., together with the other defendants named, [illegible] perfected an appeal to this court, [illegible] presenting their supersedeas bond in the [illegible] ex surety, which was filed and approved in the Circuit Court of Cook County, Illinois.

The respondent Edward [illegible] was not named [illegible] to the original cause, nor named in the [illegible] July 13, 1933, although he was [illegible] Cleaners & Dyers, Ltd., one of the defendants.

During the pendency of the appeal [illegible] above stated, the plaintiff in the [illegible] file a petition [illegible] pondents to show cause why [illegible] contempt of the Circuit Court [illegible] violation of the decretal order [illegible] rendering cleaning and pressing services at men's garments below the prices set forth in said decretal order and in advertising their said services and prices in a manner allegedly contrary to the provisions of said decree.

Pursuant to this notice certain of the respondents presented their separate petitions for a change of venue from one of the judges of Cook County then presiding, on the ground of prejudice of the said Judge against the respondent Peacock Cleaners & Dyers, Ltd. The Court denied the allowance of a change of venue upon the ground that two changes of venue were granted in the original proceeding. The respondents thereafter filed their several answers, wherein they denied they were guilty of contempt of court, as charged in the amended petition filed by the plaintiffs, and the court heard no evidence upon the issues and disposed of the charge of contempt upon the pleadings, and entered an order finding the respondent Edward A. Fink guilty of contempt of court and committed him to the County Jail of Cook County for a period of 60 days, and the respondent, Peacock Cleaners & Dyers, Ltd., guilty of contempt of court, and fined this respondent $3,000, to be paid to the Clerk of the Court, and that execution issue forthwith.

Several questions are presented by the respondents, one of which is that the defendants have appealed from the decree entered in the original cause and by the filing of an appeal bond, approved by the trial court, the same operates as a supersedeas, and the court in the instant case was without jurisdiction to enforce the final decree during the pendency of the appeal in this court from the original decree.

The plaintiffs' answer to this contention is that the order approving the bond did not make the notice of appeal given by the defendants a supersedeas. On the question of appeal the law controlling is provided for in Ch. 110, Sec.82 of the Civil Practice Act, Ill. State Bar Stats. 1935, as

Pursuant to this action cert in of the [illegible] separate petitions for a change of venue from one of the judges of Cook County then presiding, on the ground of prejudice of the said judge against the respondent Peacock Glenmore & Dyers, Ltd. The court denied the allowance of a change of venue upon the ground that two changes of venue were [illegible] in the original proceeding. The respondent thereafter filed their several answers, wherein they denied they were guilty of contempt of court, as charged in the amended petition filed by the plaintiffs, and the court heard evidence upon the issues and disposed of the charge of contempt upon the pleadings, and entered an order finding the respondent Edward [illegible] guilty of contempt of court and committed him to the County Jail of Cook County for a period of 60 days, and the respondent, Peacock Glenmore & Dyers, Ltd., guilty of contempt of court, and fined this respondent $3,000, to be paid to the Clerk of the Court, and that execution issue forthwith.

Several questions are presented by the respondents, one of which is that the decrees are erroneous from the decree entered in the original cause and by the filing of an appeal bond, approved by the trial court, [illegible] operates as a supersedeas, and the court in the instant case was without jurisdiction to enforce the final decree during the pendency of the appeal in this court from the original decree.

The plaintiffs' answer to this contention is that the order approving the bond did not make the notice of appeal given by the defendants a supersedeas. In the question of appeal the law controlling is provided for in Ch. 110, Sec. 22 of the Civil Practice Act, Ill. Stats. Ann. 1956, as

follows:

> "An appeal to the Appellate or Supreme Court shall operate as a supersedeas only if and when the appellant, after notice duly served, shall give and file a bond, in a reasonable amount, to secure the adverse party. If the bond is given before the record is filed in the reviewing court, the amount and terms thereof shall be filed and the security approved by the trial judge or his successor in office. * * * If the appeal is from a judgment or decree for the recovery of money, the condition of the bond shall be for the prosecution of such appeal and the payment of the judgment, interest, damages and costs in case the judgment is affirmed. In all other cases the condition shall be directed by the court with reference to the character of the judgment, order or decree appealed from. If notice of appeal is served within twenty (20) days after the entry of the order, determination, decision, judgment or decree complained of, and if bond is given and filed within thirty (30) days after such entry, or within such further extended time as the trial court may allow within such thirty (30) days, the notice of appeal shall, upon the approval of the bond, operate as a supersedeas. After the expiration of such thirty (30) days, no appeal shall operate as a supersedeas except upon express order of the reviewing court."

In the discussion of this question the court will consider the various provisions of the Civil Practice Act in arriving at the intention of the legislature in the passage of this act. From section 82 it is clear that the giving of notice of appeal and the approval by the court of the appeal bond operates as a supersedeas, provided they are filed within the time limited by the act, that is within 30 days after the entry of the judgment, order or decree. However, the statute provides that after the expiration of the 30 days no appeal shall operate as a supersedeas, except upon order of the reviewing court. The language of the act is clear. This view is supported by Par. 1 of Sec. 76, which we find further provides that where an appeal is perfected or allowed more than 30 days after the entry of an order, the reversal or modifi-

follows:

"An appeal to the Supreme Court shall not operate as a supersedeas only if and when the appellant, after notice duly served, shall give and file a bond, in a reasonable amount, to secure the adverse party. If the bond is given before the record is filed in the reviewing court, the amount and terms thereof shall be fixed and the security approved by the trial judge or his successor in office. * * * If the appeal is from a judgment or decree for the recovery of money, the conditions of the bond shall be for the prosecution of such appeal and the payment of the judgment, interest, damages and costs in case the judgment is affirmed. In all other cases the condition shall be directed by the court with reference to the character of the judgment, order or decree appealed from. If notice of appeal is served within twenty (20) days after the entry of the order, determination, decision, judgment or decree complained of, and if bond is given and filed within thirty (30) days after such entry, or within such further extended time as the trial court may allow within such thirty (30) days, the notice of appeal shall, upon the approval of the bond, operate as a supersedeas. After the expiration of such thirty (30) days, no appeal shall operate as a supersedeas except upon express order of the reviewing court."

In the discussion of this question the court will consider the various provisions of the civil practice act in arriving at the intention of the legislature in the enactment of this act. From section 82 it is clear that the filing of notice of appeal and the approval by the court of the appeal bond operates as a supersedeas, provided they are filed within the time limited by the act, that is within 30 days after the entry of the judgment, order or decree. However, the statute provides that after the expiration of the 30 days no appeal shall operate as a supersedeas, except upon order of the reviewing court. The language of the act is clear. This view is supported by par. 1 of sec. 76, which contains provides that where an appeal is perfected and allowed more than 30 days after the entry of an order, the reversal or modifi-

cation of the order shall not affect certain acquired rights as therein set forth and would indicate that it was the intention of the legislature that where the bond which is to act as a supersedeas is filed within 30 days it shall affect all parties and persons not parties to such action, and stay all rights and proceedings under the judgment or decree appealed from.

It is well to have in mind in this connection, in construing this act, that Par. 261, Sec. 114 of the Civil Practice Act, being Rule 37 of the schedule of rules of Court, provides for the method and manner of applying for a bond in a review court. Subdivision (4) thereof sets forth the form of the certificate to be endorsed upon the notice of appeal by the clerk of the reviewing court, and provides that said notice of appeal is made a supersedeas and "is to operate as a suspension of the execution (judgment or decree) and as such is to be obeyed by all concerned." From this provision it is clear the legislature intended that when an appeal is perfected by the filing and approval of an appeal bond operating as a supersedeas, whether in the trial court or upon leave in the reviewing court, such supersedeas shall operate as a suspension of the execution of the judgment or decree.

In Haley v. Walker 141 S. W. Rep. 166, wherein a perpetual injunction granted upon a final hearing of the merits was stayed by a supersedeas bond on appeal under the terms provided for by the statute, the Court of Civil Appeals of Texas, 1911, in passing upon the issues involved, said:

> "It is this particular reasoning that brings us to the result we arrive at in this case. In other words, the statute has said in so many words that on an appeal

cation of the order shall not affect certain acquired rights as therein set forth and would involve that it was the intention of the legislature that where the bond which is to act as a supersedeas is filed within 30 days it shall affect all parties and persons not parties to such action, and stay all rights and proceedings under the judgment or decree appealed from.

It is well to have in mind in this connection, in construing this act, that Par. 281, Sec. 114 of the Civil Practice Act, being Rule 37 of the schedule of rules of court, provides for the method and manner of applying for a bond in a reviewing court. Subdivision (4) thereof sets forth the form of the certificate to be endorsed upon the notice of appeal by the clerk of the reviewing court, and provides that said notice of appeal is made a supersedeas and "is to operate as a suspension of the execution (judgment or decree) and as such is to be obeyed by all concerned." From this provision it is clear the legislature intended that when an appeal is perfected by the filing and approval of an appeal bond operating as a supersedeas, whether in the trial court or upon leave in the reviewing court, such supersedeas shall operate as a suspension of the execution of the judgment or decree.

In Haley v. [illegible]alker 141 [illegible] 157, wherein a perpetual injunction granted upon a hearing of the merits was stayed by a supersedeas bond [illegible] under the terms provided for by the statute, the Court of Civil Appeals of Texas, 1911, in passing upon the issues involved, said:

"It is this [illegible] reasoning that brings us to the result we arrive [illegible] in this case. In other words, the statute has said [illegible]

from a final hearing the giving of a supersedeas bond shall suspend the judgment. It is not, to our minds, a question of whether it is a politic rule of law, or whether to hold that the judgment was not suspended might be more effective in some cases, but simply a question of what is the law.

The case at bar was a final hearing on the merits; it was regularly appealed, with a supersedeas bond; that judgment granted the relator a mandatory injunction and, to some extent, a prohibitive injunction; and, with the statute plainly providing that on an appeal from a final hearing on the merits the judgment shall be suspended, we are unable to do anything but hold that the judgment is suspended.

It follows that if relator's judgment, granting him an injunction, is suspended pending respondent's appeal, the injunction is stayed; therefore the respondent's failure to comply with the orders contained in the judgment and by the injunction was not violative thereof, because the same was stayed pending his appeal."

It is evident in the instant case that the decretal order is mandatory in character, and the final decree so states. In the discussion of the language of the decretal order entered in the instant case we reached this conclusion upon this appeal: That the language used by the court was mandatory in character, although prohibitory in form. The same language is used in the final decree as was used in the order granting the plaintiffs in this case a temporary injunction, and in considering this subject upon an appeal in the case of Cleaning and Dyeing Plant Owners Assn. v. Sterling Cleaners and Dyers, Inc., 278 Ill. App. 70, this court said:

"When we consider the order in the instant case, the court directs the defendants to desist from selling or rendering cleaning and dyeing service for less than the prices specified in the order, or in other words, in order to render service, the defendants are obliged to sell their service at the prices provided for in the order. The effect of this injunction order is mandatory in character. The rule is that caution should be exercised in the issuance of a mandatory injunction based upon the sworn bill of complaint alone. The plaintiff must make out a clear case, free from doubt or dispute, as a basis for its issuance. Where, as in the instant case, complete relief may be afforded the complainant upon a final hearing, upon the facts stated in

[illegible]

[illegible] suspend the judgment. It is [illegible] of whether it is [illegible] that the judgment [illegible] in some case, but plainly [illegible].

The court [illegible] was regularly opposed. [illegible] judgment granted the [illegible] some extent, a [illegible] statute plainly [illegible] begging on the merits the [illegible] are unable to do [illegible] numerous.

It follows that it relates [illegible] injunction, is suspended pending [illegible] injunction is stayed; [illegible] comply with the criteria contained in the [illegible] injunction are not [illegible] stayed pending the appeal."

It is evident [illegible] is mandatory in character, [illegible] the discussion of the [illegible] the instant case we [illegible]: That the injunction [illegible] although prohibitory in form. [illegible] final decree as was used in the [illegible] this case a temporary injunction, [illegible] upon an appeal in the case of [illegible] Agan, v. [illegible], [illegible] this court said:

"When we consider the [illegible] the court directs the [illegible] or rendering [illegible] order [illegible] to render [illegible] service of the [illegible] of this injunction [illegible] is that [illegible] datory injunction [illegible] alone. The [illegible] doubt or dispute [illegible] in the instant case, [illegible] complainant [illegible]

the bill, the plaintiffs are not entitled to a temporary injunction which is mandatory in character. * * *

What we have said in regard to the mandatory character of the order entered by the court in fixing the prices for cleaning and dyeing services that appear in the temporary injunction applies with equal force to the paragraph contained in the same order that prohibits the defendants from the use of advertising mediums in an effort to sell the service at prices other than set forth in the injunctional order."

It has been held in Barnes v. Typographical Union, 232 Ill. 402, that if an injunction is mandatory, the taking of an appeal, which operates as a supersedeas, precludes the trial court from entering any further orders in execution of the decree until the appeal is disposed of. The court said:

"There are judgments and decrees which require something to be done for their enforcement and there are others which are simply prohibitory or self-executing, and others partaking of the nature of both. A prohibitory decree which does not require anything to be done is self-executing. It requires no process, but by force of the decree itself the party is bound to desist from the prohibited act. If an injunction is of a mandatory character, requiring something to be done, or if negative in terms but with the same effect, a proceeding for contempt in refusing to obey it is in the nature of an execution to enforce the command. An injunction the effect of which is to authorize one party to take possession of property or to do some act, although it may be negative in form as against the other party and merely commands the latter not to obstruct the former in taking possession of the property or doing the act, is in reality affirmative in its nature, and a proceeding for contempt would have for its object to accomplish the doing of the act. An appeal would stay any such proceeding, while it would have no such effect with respect to the power of the court to compel obedience to a self-executing decree."

So from this authority it is apparent that where an appeal from a decree is perfected from which an injunction was granted providing for a mandatory direction to the parties affected to comply with the injunction, further proceedings are stayed until the matter on appeal is disposed of by the appeals court. As we have already indicated, the order of the

the bill, the plaintiffs are entitled to a temporary injunction which [illegible] in effect.
* * *

"But we have still to regard to the mandatory character of the order entered by the court in fixing the prices for cleaning and dyeing services that [illegible] in the temporary injunction applies with equal force to the paragraph contained in the same order that restrains the defendants from the use of advertising medium in an effort to sell the services at prices other than set forth in the injunctional order."

It has been held in [illegible] v. [illegible], 232 Ill. 402, that if an injunction is mandatory, the taking of an appeal, which operates as a supersedeas, vacates the trial court from entering any further order in execution of the decree until the appeal is disposed of. The court said:

"There are injunctions and decrees which require something to be done for their enforcement and there are others which are simply prohibitory or self-executing, and other partaking of the nature of both. A prohibitory decree which does not require anything to be done is self-executing. It requires no process, but by force of the decree itself the party is bound to desist from the prohibited act. If an injunction is of a mandatory character, requiring something to be done, or if negative in terms but with the same effect, a proceeding for contempt is relating to obey it is in the nature of an execution to enforce the compliance. An injunction the effect of which is to authorize one party to take possession of property or to do some act, although it may be negative in form, is in fact a mandatory and merely commands the injured party to continue the status in taking possession of the property or doing the act, so in reality affirmative in [illegible], and a proceeding for contempt would have for its object to compel obedience to the terms of the act. An appeal could only stay such proceeding, while it would have no such effect with respect to the power of the court to compel obedience to a self-executing decree."

So from this authority it is apparent that [illegible] in appeal from a decree is perfected from an injunction [illegible] granted providing for a mandatory direction to the parties affected to comply with the injunction, further proceedings are stayed until the matter on appeal is disposed of by the appeals court. [illegible] we have already indicated, the order of the

court in its decree enjoining the defendants from selling their service at a price less than the amount fixed in the decree is mandatory in character but negative in form. In other words, the defendants are required to charge for their services the amount fixed in the decree and are prohibited from transacting their business in accordance with their plan and method heretofore followed. Therefore, we believe the opinion above quoted is applicable to the matter before us here on appeal.

Another material fact is, the record in the instant case does not disclose the plaintiffs suffered any damage or injury as the result of the acts of contempt complained of by them.

In the case of Rothschild & Co. v. Boston Store of Chicago, 219 Ill. App. 419, which was an appeal to this court from an order granting an injunction, we said in discussing the question involved:

> "We understand it to be the law that in a proceeding to punish a party for the breach of an injunction, the party complaining must not only show a breach, but he must also show that he has in some way been injured thereby." Citing People v. Diedrich, 141 Ill. 665.

The reason for this rule is stated in the case of People v. Diedrich, 141 Ill. 665, as follows:

> "Prosecutions for contempt are of two kinds. When instituted for the purpose of punishing a person for misconduct in the presence of the court, or with respect to its authority or dignity, it is criminal in its nature. When put upon foot for the purpose of affording relief between parties to a cause in chancery it is civil - sometimes called remedial. Numerous authorities could be cited in support of this distinction, but the decisions of this court leave no doubt on the subject. (Crook et al. v. The People, 16 Ill. 534; Buck v. Buck, 60 id, 105; Leopold v. The People, 140 id. 552.)"

court in a decree enjoining [illegible] from [illegible] their service at a price less than [illegible] fixed in the decree is mandatory in character but [illegible] in form. In other words, the defendants are [illegible] to [illegible] in services the amount fixed in the decree and are [illegible] from transacting their business in [illegible] with their plan and method but [illegible]. [illegible], we [illegible] the opinion more under is [illegible] to the matter before us here on appeal.

Another material fact is the [illegible] in the instant case does not disclose the [illegible] suffered any damage or injury as the result of the acts of [illegible] complained of by them.

In the case of Rothschild & Co. v. Carter Clerk of Chicago, 216 Ill. [illegible], 419, [illegible] appeal to this court from an order granting an injunction, we said in discussing the question involved:

> "We understand it to be the law that in [illegible] to obtain a party for the breach of a [illegible], the party complaining must not only show a [illegible], but he must also show that he has in some way been injured thereby. Citing People v. [illegible], [illegible] Ill. [illegible]."

The reason for this rule [illegible] of People v. Diehlman, 141 Ill. [illegible], [illegible]:

> "Prosecutions for contempt are [illegible] instituted for the purpose of [illegible] for misconduct in the presence of the [illegible] respect to its authority or dignity, [illegible] in its nature. When out upon [illegible] affording relief between [illegible] it is civil - [illegible] theorities seem to be cited in support of [illegible], but the decisions of this court are to the contrary on the subject. (Crook et al. v. The People, [illegible]; Buck v. Buck, 65 Ill. 102; Rossolo [illegible] v. The People, 140 Ill. 552.)"

Accordingly, the contempt charge on application of the plaintiffs is remedial in character, that is, instituted for the purpose of compelling obedience to the injunction, and of affording relief as prayed for by the plaintiffs, and an appeal will lie from the order of the court, either in imposing a fine or in discharging the defendants.

From the record as we find it, we are of the opinion that the appeal of the defendants now in this court was perfected in the mode provided for by the Civil Practice Act, herein referred to, and that the court in imposing punishment for the alleged contempt was without power to do so, for want of proof that the plaintiffs suffered damage. Therefore, the order entered by the court is erroneous, and for that reason is reversed.

ORDER REVERSED.

HALL, P. J. AND
DENIS E. SULLIVAN, J. CONCUR.

Accordingly, the contempt of [illegible] the plaintiffs is remedial in character, that is, it lies for the purpose of compelling obedience to the [illegible] granting relief as prayed for by the plaintiffs, and [illegible] life from the order of the court, either in [illegible] or in disobeying the decree.

From the record we find it, [illegible] that the appeal of the defendants [illegible] in the mode provided for by the civil [illegible], and in relation to, and that the court in imposing punishment for the alleged contempt was without power to do so, for [illegible] the plaintiffs suffered damage. Therefore, the order entered by the court is erroneous, and for that reason is reversed.

OR[illegible].

HALL, P. J., AND
DENIS E. SULLIVAN, J., DO CONCUR.

38497

CLEANING & DYEING PLANT OWNERS ASSOCIATION OF CHICAGO, a Corporation not for profit, et al,

Plaintiffs (Appellees),

v.

EDWARD A. FINK and PEACOCK CLEANERS & DYERS, LTD., a Corporation,

Defendants (Appellants).

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

285 I.A. 590

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal in this case, wherein the respondent Peacock Cleaners & Dyers, Ltd. was found guilty of contempt of Court in violating the decree entered on July 13, 1935, was consolidated with case No. 38496 for hearing, and the opinion filed in that case is controlling upon the facts and the law in the instant case. Therefore the order finding this respondent guilty of contempt of court and assessing a fine of $3,000 for such violation is reversed.

ORDER REVERSED.

HALL, P. J. AND
DENIS E. SULLIVAN, J. CONCUR.

88497

GIANNINO & DYSINGER OF NY D BOND
ASSOCIATION OF BRIDGES, a
Corporation not for profit, et al.,

Plaintiffs (petitioners),

v.

EDGARD A. FINK and [illegible] OF
& DYSING, LTD., a corporation,

Defendants (petitioners).

MR. JUSTICE [illegible] DELIVERED [illegible]

The appeal in this case, wherein the [illegible] Peacock Glasmere & Yarn, Ltd. was found guilty [illegible] of Court is violating the [illegible] Act, 1888, was consolidated with case No. 4898 [illegible] opinion filed in that case is controlling [illegible] and the law in the instant case. [illegible] this respondent guilty of contempt of [illegible] fine of $3,000 for each violation is [illegible].

[illegible]

HALL, P. J. AND
DENIS E. SULLIVAN, J., [illegible].

38916

PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, et al.,
Appellees,

vs.

WILTON B. MARTIN,
Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

285 I.A. 591

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their bill of complaint February 3, 1934, praying the foreclosure of a trust deed executed November 18, 1927, to secure an indebtedness in the sum of $76,000, represented by a note for that amount and of that date, drawing interest at the rate of five and one-half per cent per annum. The interest was represented by coupons falling due upon the dates upon which interest would become due and payable.

The bill alleged defaults in the payment of an interest coupon for $2090, due October 15, 1933, and of taxes for the years 1928 to 1931, inclusive, amounting to $29,475.59, which plaintiffs paid in order to protect their lien under the trust deed. The bill also alleged that plaintiffs, by reason of these defaults, elected to declare the whole indebtedness due and payable; that in and by the deed the mortgagor consented that in case of the filing of a bill to foreclose, a receiver might be appointed with the usual powers; that the premises were improved with a six-apartment brick building, half vacant, and that the premises were not worth more than $75,000, and were therefore scant and meager security for the indebtedness, and for this reason a receiver should be appointed at once in order that the income derived from the property might be applied to accruing taxes and needed repairs; that the conveyance covered all rents, issues and profits which should at any time accrue from the premises.

38016

PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, et al.,
Appellees,

vs.

WILTON B. MARTIN,
Appellant.

285 I.A. 571

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their bill of complaint at the term, 1934, praying the foreclosure of a trust deed executed November 14, 1927, to secure an indebtedness in the sum of $76,000, represented by a note for that amount and of that date, bearing interest at the rate of five and one-half per cent per annum. The interest was represented by coupons falling due upon the dates upon which interest would become due and payable.

The bill alleged defaults in the payment of an interest coupon for $2090, due October 14, 1933, and of three for the years 1928 to 1931, inclusive, amounting to $8,475.80, which plaintiffs paid in order to protect their lien under the trust deed. The bill also alleged that plaintiffs, by reason of these defaults, elected to declare the whole indebtedness due and payable; that in and by the deed the mortgagor consented that in case of the filing of a bill to foreclose, a receiver might be appointed with the usual powers; that the premises were improved with a six-story fireproof brick building, half vacant, and that the premises were not worth more than $75,000, and were therefore scant and inadequate security for the indebtedness, and for this reason a receiver should be appointed at once in order that the income derived from the property might be applied to accruing taxes and needed repairs; that the conveyance covered all rents, issues and profits which should at any time accrue from the premises.

On February 23, 1934, Wilton B. Martin, the mortgagor, filed an answer, admitting the indebtedness, the execution of the deed and the defaults, but denying that the premises are worth not more than $75,000; on the contrary are in fact worth at least $200,000; that the apartment building is exceptionally fine with large apartments, each of which occupies the whole floor and each equipped with an electric refrigerator, exceptionally large and commodious, operated from a central system; that a vacuum cleaning system and passenger and service elevators are provided; that there is an inter-apartment telephone system and fine white metal enclosures for bathroom showers; that the hardware is of solid bronze, and the floors of quarter-cut oak, and the dining, library and living rooms are wood-paneled; that there are individual laundries, stoves, wood-burning fireplaces equipped with gas lighters, etc.; that the building is of re-enforced concrete, a construction not subject to depreciation, on a corner lot 50 x 107 feet, and consists of eight stories, with basement containing a large lobby reception room, a ball room and janitor's quarters; that the property is situated on the south side of East Walton place at the corner of Seneca street and is almost directly across the street from the Drake hotel and surrounded by highclass residences in great demand; that it is a part of the "Gold Coast" of Chicago; that defendant purchased the land about 1917 and paid therefor $60,000, and erected and equipped the building at a cost of about $350,000; that the property is therefore ample security.

The bill and the answer were duly verified.

March 24, 1936, on motion of plaintiffs, the court, after hearing evidence, appointed a receiver, and from that order defendant has perfected this appeal.

The hearing was continued from time to time, and upon the suggestion of the court and without objection from defendant, an

On February 22, 1934, William A. Smith, the mortgagor, filed an answer, admitting the indebtedness, the execution of the deed and the default, but denying that the premises are worth not more than $75,000; on the contrary are in fact worth at least $200,000; that the apartment building is exceptionally fine with large apartments, each of which occupies an entire floor and each equipped with an electric refrigerator, exceptionally large and commodious, operated from a central system; that a vacuum cleaning system and passenger and service elevators are provided; that there is an inter-apartment telephone system and fire proof enclosures for bathroom showers; that the exterior is of solid bronze, and the floors of quarter-cut oak, and the dining, library and living rooms are wood-paneled; that there are individual laundries, stoves, wood-burning fireplaces equipped with gas lighters, etc.; that the building is of re-enforced concrete, a construction not subject to depreciation, on a corner lot 50 x 107 feet, and consists of eight stories, with basement containing a large lobby reception room, a ball room and janitor's quarters; that the property is situated on the south side of West Wilson and on the corner of Seneca street and is almost directly across the street from the Drake hotel and surrounded by dignified residences in great demand; that it is a part of the "Gold Coast" of Chicago; that defendant purchased the land about 1917 and said mortgagor [illegible], and erected and equipped the building at a cost of about $[illegible]; that the property is therefore ample security.

The bill and the answer were duly verified.

March 24, 1936, on motion of plaintiff, the court, after hearing evidence, appointed a receiver, and from that order defendant has perfected this appeal.

The hearing was continued from time to time, and upon the

appraisal of the premises was obtained from the Chicago Real Estate board. This appraisal, made by a committee of five members of the board, was received in evidence, defendant objecting, however, that the appraisal was not made on the proper basis. It was conceded that the total indebtedness due plaintiffs at the date of the hearing was $132,261.68. The committee fixed the fair market value of the property as of May 5, 1936, at $61,650.00.

Mr. Albert W. Swayne, a former president of the Real Estate board, testified for defendants that he had prepared an appraisal in accordance with the system used by the United States government in connection with its Home Loan appraisals; that he established a value based on reproductive cost, less depreciation for the life of the property. There were two other types of appraisals, he said, one made on the basis of capitalizing the average net annual income of the property over a period of the last ten years, and the other based on the capitalization of the net income of the property as at present operated. He estimated the reproduction cost of the building at present at $389,000 and deducted therefrom 40% for depreciation, (the building having been constructed in 1916 or 1917) and gave an estimated net value of $268,880, including $35,000 for the ground value. The assessed value of the ground at the present time and also the blue book value as published, he said, was $35,000. He had received from the mortgagor, Mr. Martin, a statement of income of the property, which showed the net annual income for a period from 1925 to 1933 to be $22,708. He estimated the operating expense of the property at $12,000 a year, including the taxes. Mr. Swayne further testified that the actual income under the leases then existing for the year beginning October 1st and ending the next October was $14,850; that deducting $12,000 gave a net of $2,850, which, capitalized on a basis of five per cent, gave a value for the building of $57,000, and with $35,000 added for

appraisal of the premises was obtained from the assessor, as a separate board. This appraisal, made by a committee of five members of the board, was received in evidence, defendant objecting, however, that the appraisal was not made on the proper basis. It was conceded that the total indebtedness due plaintiffs by the date of the hearing was $125,881.07. The committee fixed the fair market value of the property as of May 8, 1930, at $81,000.

Mr. Albert W. Swayne, a former president of the real estate board, testified for defendants that the [illegible] appraisal in accordance with the system used by the [illegible] government in connection with its loans on real [illegible] estimated a value based on reproductive cost, less depreciation for the life of the property. There were two other types of [illegible], he said, one made on the basis of capitalizing the [illegible] actual income of the property over a period of the last two years, and the other based on the capitalization of the [illegible] property as at present operated. He estimated the reproduction cost of the building at present at $250,000 and deducted therefrom $[illegible] for depreciation, (the building having been constructed in 1915 or 1917) and gave an estimated net value of $200,[illegible], [illegible] $[illegible],000 for the ground value. The assessed value [illegible] the [illegible] present time and also the blue book value [illegible], was $35,000. He had received from the [illegible], Mr. [illegible], a statement of income of the property, which showed the net [illegible] for a period from 1925 to 1930 to be $[illegible]. [illegible] the operating expense of the property at $[illegible] a year, including the taxes.

Mr. Swayne further testified that the total income under the leases then existing for the year beginning October 1st and ending the next October was $14,880; that [illegible] $[illegible],000 gave a net of $2,850, which, capitalized on a basis of five per cent, gave a

ground value, made a total valuation from its then earning power of $92,000. Averaging three appraisals of $254,880 for reproduction value, $235,000 for its average annual income over the past ten years, and $92,000 for its value based on its present earning power, gives a mean valuation of $198,960. Mr. Swayne also said that he had talked with one of the Real Estate board appraisers, who fixed the fair market value at $61,000. He said this appraiser proceeded on the theory that the ten-room apartments were a thing of the past in Chicago, that people had gone from the ten-room to the five-room apartments, and that there was no future market for ten-room apartments. Asked what he would say about this theory, Mr. Swayne replied it was a matter of opinion pure and simple; that he did not think there was any justification for it; that he had been operating and renting a number of buildings and knew that a ten or twelve-room apartment had not commanded any higher rentals than the four, five and six-room apartments; that this building was one of the finest constructed in that section of the city; that it had Bedford stone facing, vitreous enamel plumbing fixtures throughout, used in the very finest and most expensive buildings, high-class nickel trimming, higher ceilings than the ordinary ones, and a sort of mahogany woodwork. He would say that it was the most expensive building per cubic foot of contents in the district. This witness also expressed the opinion that the rentals of the building would go up from $20,000 to $25,000 during the next few years, based on the normal increase of the rents, but he did not expect to see this type of apartment building get back to the point they were at one time; that an insurance company would, he thought, lend $100,000 on the property, with prepayments of $2,000 a years

Walter Salmon, who has been in the real estate and mortgage loan business for thirty years, said that the rentals of ten-room

[illegible] of $[illegible],000. Averaging [illegible] 880 [illegible]-tion value, $[illegible],000 for the average [illegible] ten years, and [illegible] power, gives a [illegible] that he had taken all [illegible] who filed the [illegible] proceeded on the theory [illegible] of the past in Chicago, [illegible] the five-room apartments, [illegible] ten-room apartments. [illegible] ar, Swayne replied it was a [illegible] that he did not think there was any [illegible] had been operating and renting a [illegible] a ten or twelve-room apartment [illegible] than the four, five and six-room [illegible] one of the finest constructed [illegible] had bedford stone facing, [illegible] out, need in the very finest [illegible] glass model trimming, higher ceilings [illegible] a sort of mahogany woods [illegible] expensive building per cubic foot [illegible] This witness also expressed the opinion [illegible] building would go up from [illegible] years, based on the normal increase [illegible] expect to see this type of apartment building [illegible] point they were at one time; that in [illegible] thought, land also, and the property [illegible] a years

Walter Salmon, [illegible] loan business for thirty years, [illegible] the [illegible] of six-room

apartments were increasing, and that these apartments were very desirable. Mr. Rutherford, also in the real estate business, said he anticipated a ten per cent increase in rents during the next rental season, and that he estimated the fair cash market value of the property to be from $165,000 to $200,000. Mr. Greenlee testified that in February, 1933, there was a twenty-four per cent vacancy in that district, in 1934, a twelve per cent vacancy and in 1935 a ten per cent vacancy; that rents were at the lowest ebb in 1933, and that there has since been a gradual rise; that the rents, where leases expired May 1, 1936, were being raised ten per cent, and that the property here in controversy should bring in the open market under fair conditions $200,000.

Mr. Olsen, an architect who had been an appraiser for twenty-five years and who owned apartment buildings, estimated the reasonable value of the premises to be $195,000. He testified he arrived at his valuation based on the replacement cost and did not think it was fair to use present rentals in establishing value.

Mr. Martin, defendant, testified he paid $40,000 for the land and $350,000 for the building; that there were sixty rooms, also a janitor's apartment, a ballroom and extra service rooms.

Mr. Springer, a witness for plaintiffs, said that he had been in the real estate mortgage business for forty years and connected with insurance and trust companies; that he knew the property in question; that its reproduction cost, less depreciation, was $109,533, and with the land the value was $136,283; that its economic value was not over $75,000; that he valued the land alone at $36,000.

Statements of rents and operating expenses from 1922 to 1935 were received in evidence, showing the highest rental to be in 1924, which was $35,821, the lowest in 1933, $8,944, and also showing the rental in 1934 amounted to $9,128, in 1935, $12,385,

apart with were interest [illegible]
desirable. Mr. Rutherford, who is and [illegible] said
he anticipated a [illegible] that [illegible]
rental season, and [illegible] value of
the property to be [illegible]
fied that in February, 1924, [illegible]
vacancy in that district, in [illegible]
in 1925 a ten per cent vacancy; [illegible]
in 1926, and that there has been [illegible]
rents, where leases expired [illegible]
per cent, and that the property was in [illegible]
in the open market [illegible]

Mr. Olsen, we are [illegible] for
twenty-five years [illegible] fixed the
reasonable value of the property to be [illegible]. He testified he
arrived at his valuation based on the [illegible] cost [illegible] did not
think it was fair to use present [illegible] in [illegible]

Mr. Martin, defendant, testified [illegible] the
land and $350,000 for the [illegible]
also a janitor's apartment, [illegible]

Mr. Springer, [illegible]
been in the real estate [illegible]
nected with [illegible]
in question; that [illegible]
$109,352, and [illegible]
economic value was not over [illegible]
at $36,000.

[illegible]
1925 were received in evidence, [illegible] to be in
1924, which was $36,881, the lowest in 1918, $24,041, and also
showing the rental in 1924 [illegible]

the operating expenses for 1934, $6610.26 and in 1935, $5848.23. The court gave careful consideration to this matter. The taxes were in arrears for many years.

Defendant cites Frank v. Siegal, 263 Ill. App. 316, which holds that notwithstanding provisions in the trust deed as to the appointment of a receiver, the burden of proof is upon complainant to show that the security is scant and meager in order to justify an appointment by the chancellor. We think plaintiffs here complied with this rule as to the burden of proof. At any rate, under the conflicting evidence the opinion of the chancellor is entitled to great weight, and the question for decision here is whether the appointment constituted an abuse of discretion. We hold it did not. It is apparent, we think, from all the evidence that, considered from the standpoint of permanency, the original investment was unwise. The true test of value in a case of this kind is the fair cash market value of the premises. Applying that test, we think the security for the indebtedness is meager, scant and inadequate, and that the court did not abuse its discretion in appointing a receiver.

The order of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

the operating expenses for 1934, [illegible] 25 [illegible] 2.25. The court gave careful consideration to this [illegible]. [illegible] were in arrears for many years.

Defendant cites [illegible], [illegible], [illegible] holds that notwithstanding proven [illegible] the appointment of a receiver, the [illegible] in [illegible] to show that the security is [illegible] in order to justify an appointment by the [illegible]. [illegible] complied with this rule as to the [illegible] of proof. [illegible] under the conflicting evidence [illegible] is entitled to great weight. [illegible] whether the appointment constituted an [illegible] of discretion. We hold it did not. It is [illegible], we [illegible] that, considered from the standpoint of permanency, the original investment was unwise. The time [illegible] in a case of this kind is the fair cash market value of the [illegible]. [illegible] test, we think the security for the [illegible] is [illegible], scant and inadequate, and that the court did not abuse its discretion in appointing a receiver.

The order of the trial court is affirmed.

[illegible]

McGlynn, P. J., and O'Connor, [illegible].

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38099

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LILLA H. WALTER,
(Petitioner) Appellee,

v.

MARTIN DURKIN, Director of the
Department of Labor of the State
of Illinois, et al.,
(Defendants) Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

285 I.A. 591

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On February 2, 1934, Lilla H. Walter filed her petition for mandamus, seeking to be reinstated in the position of Superintendent of Free Employment, Division of Free Employment, Department of Labor of the State of Illinois. The petitioner also prays that the defendants be commanded to pay to her the salary appropriated for the position. The Attorney General filed a general and special demurrer to the petition on behalf of the defendants. Both were overruled and defendants electing to stand by the demurrers, judgment was entered that the writ of mandamus issue as prayed in the petition. Defendants have appealed and are asking that the judgment be reversed with directions to the trial court to sustain their demurrers and dismiss the petition.

The petition alleges, in substance, that on December 2, 1919, after petitioner had taken the examination for the position in question, she was duly certified and appointed to the position; that on October 9, 1916, she was appointed Solicitor of Employment, Chicago Free Employment Offices, and served in that capacity until April 10, 1917, when she was appointed Superintendent in charge of Women's and Girls' Division under the supervision of the General

38099

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LILLA E. [illegible],
(Petitioner) Appellee,

v.

MARTIN DUFFIN, Director of the
Department of Labor of the State
of Illinois, et al.,
(Defendants) Appellants.

285 I.A. 327

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

On February 2, 1934, Lilla E. [illegible] filed her petition for mandamus, seeking to be reinstated in the position of Superintendent of Free Employment, Division of Free Employment, Department of Labor of the State of Illinois. The petitioner also prays that the defendants be commanded to pay to her the salary appropriated for the position. The [illegible] filed a general and special demurrer to the petition on behalf of the defendants. Both were overruled [illegible] and they elected to stand by the demurrers. Judgment was [illegible] for the writ of mandamus issue as prayed in the petition. [illegible] appealed and are asking that the judgment be reversed [illegible] the trial court to sustain their demurrers and dismiss the petition.

The petition alleges, in substance, that on December 2, 1919, after petitioner had taken the examination for the position in question, she was duly certified and appointed to the position; that on October 9, 1931, the [illegible] director of Employment, Chicago Free Employment Office, [illegible] in that capacity until April 10, 1934, when she was appointed superintendent in charge of Women's and Girls' Division under the supervision of the General

Superintendent; that on October 1, 1933, Martin Durkin succeeded Barney Cohen as Director of the Department of Labor of the State of Illinois, and said Durkin is now the director of the department; "that on January 23, 1933 she received a notice terminating her employment as 'Superintendent of Women's Division of Chicago Free Employment Office' as of that date, * * * which notice is in words and figures as follows, to-wit:

"STATE OF ILLINOIS
DEPARTMENT OF LABOR
SPRINGFIELD, ILLINOIS.

"Mrs. Lilla H. Walter
2315 East 70th Street
Chicago, Illinois

"Dear Madam:

"This is to notify you that your services as Superintendent of the Women's Division of the Chicago Free Employment Office will terminate with the close of business Monday, January 23, 1933.

"This is in accordance with carrying out the program of economy and for no other reason.

"The position of Superintendent of the Women's Division of the Chicago Free Employment Office has been abolished, effective January 23, 1933.

"Yours very truly,

"(Signed) A. H. R. Atwood
Assistant Director"

The petition alleges that the said notice was illegal and of no force and effect in that:

"(a) Said notice of lay-off was not signed by the appointing officer;
"(b) That said notice did not designate the title of positions held by your petitioner in the classified service of the State of Illinois;
"(c) That said lay-off of your petitioner as a member of the classified service and the retention of two temporary appointees, was in violation thereof."

The petition further alleges that Atwood was not the appointing officer and that "co-incident with the lay-off of your petitioner, on to-wit, January 23, 1933 two temporary appointees, one John Solberg and one Lisle Oberhardt, acting as Superintendents of Free Employment under temporary authority were retained as such on January 23, 1933 at the

Superintendent; that on October 1, 1933, [illegible] succeeded Barney Cohen as Director of the Department of Labor of the State of Illinois, and said Durkin is now the Director of the Department; "that on January 23, 1934 you received [illegible] employment as Superintendent of [illegible] and Employment Office, one of that [illegible] and figures as follows, to-wit:

"[illegible]
[illegible]
[illegible]

"Mrs. Lillie K. Walsh
2313 West 79th Street
Chicago, Illinois

"Dear Madam:

"This is to notify you that your services in the Unemployment of the Women's Division of the Chicago Free Employment Office will terminate with the close of business [illegible]

"This is in accordance with carrying out the program of economy and for no other reason.

"The position of Superintendent of the Women's Division of the Chicago Free Employment Office was [illegible] January 23, 1934.

"Yours very truly,

"(Signed) [illegible]
[illegible]"

The petition alleges that the said notice and [illegible] and effect in that:

"(a) Said notice of lay-off was not issued by the [illegible] ing officer;

"(b) That said notice did not [illegible] stone held by your petitioner in [illegible] of the State of Illinois;

"(c) That said lay-off of your petitioner [illegible] the classified service and [illegible] temporary appointee, was in violation [illegible]

The petition further alleges that [illegible] and that "co-incident with the lay-off of your petitioner, on to-wit, January 23, 1934 two temporary appointees, one [illegible] and one [illegible], acting as Superintendent of the Employment under temporary authority were assigned on [illegible] January 23, 1934 at the

time your petitioner's services were terminated by said notice of January 23, 1933;" that on January 24, 1933, petitioner served a notice in writing upon the Director of the Department of Labor, demanding her reinstatement to the position in question. The petition further recites that the petitioner, "under Section 12 of 'An Act to Regulate the Civil Service of the State of Illinois,'" on January 25, 1933, filed a formal request for a hearing before the Illinois State Civil Service Commission, and that on June 19, 1933, by leave of the Commission, she "filed an amended petition together with a letter addressed to the Illinois State Civil Service Commission, which letter is in words and figures as follows:

"Illinois State Civil Service Commission,
Springfield, Illinois

"Gentlemen:

"Referring to my letter of January 25, 1933, also the Secretary's reply of January 26th and my response of January 30th. Being advised accordingly and after due consideration, it seems in order to have a hearing before the Civil Service Commission.

"It is my belief, upon investigation, of the changes in the Chicago Free Employment office and the employment of non-civil service appointees in that office, my removal was made by evading the Civil Service Law, for political and other reasons, in conflict with said Law.

"My dismissal letter specified 'Economy and for no other purpose.'

"Alleging evasion of the Law and the purpose designated not accomplished, other superintendents having been appointed who are not under Civil Service, and, alleging further that such action is in direct violation of the Civil Service Law, I hereby respectfully request a hearing and reinstatement.

"Very respectfully,

(Signed) "Lilla H. Walter

"Temporary address-
760 Sheridan Road,
Glencoe, Illinois"

The petition further recites that the said Commission notified her that the hearing on her petition was set for August 1, 1933, at 9 o'clock A. M.; that "on August 1, 1933, a hearing on the petition of your petitioner was had before the Illinois State Civil Service Commission, and notwithstanding the fact that it was shown that

time your petitioner's position was [illegible] of January 23, 1932;" that on January 6, 1937, petitioner served a notice in writing upon the director of [illegible] demanding her reinstatement in the position [illegible] petition further avers that the petitioner, [illegible] of 'an act to segregate the civil service of the state of Illinois,' on January 13, 1933, filed a [illegible] Illinois state civil service commission, [illegible] by leave of the commission, she filed an amended petition, [illegible] with a letter addressed to the 23 [illegible] civil service commission which letter is in words and figures as follows:

"Illinois State Civil Service Commission,
Springfield, Illinois

"Gentlemen:

"Referring to my letter of January 2, 1933, [illegible] reply of January 6th and my telegram of January [illegible] advised accordingly and after one consideration, I [illegible] order to have a hearing before the civil service commission.

"It is my belief, upon investigation, [illegible] Chicago 'Tax Employment office' [illegible] service appointees in that office, by a moral [illegible] the Civil Service Law, for politics I am other [illegible] illot with said law.

"My dismissal letter specified 'economy' [illegible]

"Alleging evasion of the law and the politics [illegible] accomplished, other appointment was having [illegible] not under civil service, and, with [illegible] is in direct violation of the civil service [illegible] kindly request a hearing and reinstatement.

"Very respectfully,

(signed) [illegible]

"Temporary address-
750 Sheridan road,
Glencoe, Illinois."

The petition further avers that the civil service commission denied her the hearing on her petition [illegible] 1, 1937, at [illegible] o'clock A. M.; that "on January 1, 1937, [illegible] in the petition of your petitioner had before the Illinois civil service commission, and notwithstanding the fact that it was shown that

political appointees were acting as Temporary Appointees, and that your petitioner has been illegally ousted, in that (a) she had not received any notice of lay-off by the appointing officer, to-wit: Barney Cohen and (b) her notice of lay-off did not designate specifically her title, and (c) the fact that the Assistant Director, A. H. R. Atwood had laid off your petitioner and retained temporary appointees (in violation of Section 5, Rule 7 of the Illinois State Civil Service Commission) said Illinois State Civil Service Commission enclosed a copy of its decision to Michael F. Ryan, attorney for your petitioner under date of August 18, 1933, in words and figures as follows, to-wit:

"ILLINOIS STATE CIVIL SERVICE COMMISSION

"LILLA H. WALTERS, PETITIONER
VS.
DEPARTMENT OF LABOR, STATE OF
ILLINOIS, RESPONDENT

"PRESENT

"W. Emery Lancaster, President
John V. Clinnin, Member
Ernest Hoover, Member

"Hearing was called before the Illinois State Civil Service Commission in the case of Lilla H. Walters, Superintendent, Free Employment Office, Department of Labor; said hearing being called on notice of January 24, 1933.

"A statement, in writing, in accordance with the Civil Service Law, was filed by the petitioner, setting forth that her removal was made for political and other reasons and respectfully requested a hearing and reinstatement.

"Hearing was had on this case before the Illinois State Civil Service Commission on August 1, 1933. The evidence discloses in this case, that prior to date of dispensing with the services of Mrs. Walters, there had been three (3) Superintendents of Free Employment Offices and after a careful survey of the Department, it was determined that the Department could efficiently function with the services of only two (2) Superintendents as they had more employees than were needed to satisfactorily conduct the business of the Department.

"The evidence further discloses that the action in dispensing with the services of Mrs. Walters was taken in accordance with the program of economy and retrenchment of the Department.

"The evidence discloses there was nothing to indicate that the action of the Department in dispensing with the services of Mrs. Walters was taken for any political cause, as no sufficient evidence was submitted to the Commission by the Petitioner to sustain the allegations as set forth in her statement for hearing.

political appointees were acting as temporary appointees, and that your petitioner has been illegally ousted, in that (a) she had not received any notice of lay-off by the examining officer, to-wit: Harvey Cohen and (b) her notice of lay-off did not designate specifically her title, and (c) the fact that the Assistant Director, a. H. i. Atwood had laid off your petitioner and retained temporary appointees (in violation of Section 5, rule 7 of the Illinois State Civil Service Commission) said Illinois State Civil Service Commission analyzed a copy of its decision to Michael F. Ryan, attorney for your petitioner under date of August 18, 1933, in words and figures as follows, to-wit:

"ILLINOIS STATE CIVIL SERVICE COMMISSION

"ILLIA H. ALTERS, PETITIONER

vs.

DEPARTMENT OF LABOR, ETC.,
ET AL., RESPONDENTS

"PRESENT

"W. Henry Lancester, President
John V. Gilmartin, Member
Ernest Hoover, Member

"Hearing was called before the Illinois State Civil Service Commission in the case of Illia H. Alters, Superintendent, Free Employment Office, Department of Labor; said hearing being called on notice of January 24, 1933.

"A statement, in writing, in accordance with the Civil Service Law, was filed by the petitioner, setting forth that her removal was made for political and other reasons and respectfully requested a hearing and reinstatement.

"Hearing was had on this case before the Illinois State Civil Service Commission on August 1, 1933. The evidence in this case, that prior to date of disposing with the services of Mrs. Alters, there had been three (3) superintendents of the Employment Offices and after a careful survey of the department, it was determined that the department could efficiently transaction with the services of only two (2) Superintendents as they had more employees than were needed to satisfactorily operate the work of the Department.

"The evidence further discloses that the action in dispensing with the services of Mrs. Alters was taken in accordance with the program of economy and retrenchment of the Department.

"The evidence discloses there was nothing to indicate that the action of the Department in dispensing with the services of Mrs. Alters was taken for any political cause, as no self-interest evidence was submitted to the Commission by the Petitioner to sustain the allegations as set forth in her statement for hearing.

"Therefore, the Illinois State Civil Service Commission finds the dispensing of the services of Mrs. Walters was not done for political cause as alleged in her statement for hearing.

"SIGNED

"W. Emery Lancaster, President

"John V. Clinnin, Member

"Ernest Hoover, Member."

The petitioner further alleges that on September 1, 1933, she petitioned the said Commission "for an investigation under Section 14 of 'An Act to Regulate the Civil Service of the State of Illinois.'" This petition is a lengthy one. By it petitioner sought to have the Commission conduct an investigation, under section 14 of the Act, to determine the methods of administration of the Department of Labor of the State of Illinois in reference to the State Civil Service Law and the rules of the Commission pertaining to the position of petitioner, and to take appropriate action "to end that your petitioner may be immediately reinstated and reassigned to duty, and with full compensation from the date of her unlawful lay-off," and for such other action as the Commission may deem meet under said section. The petition recites that her attorney, Michael F. Ryan, received, on November 28, 1933, the following letter from the Commission:

"My dear Mr. Ryan:

"In answer to your letter of November 3rd in re petition of Lilla H. Walter, Superintendent of Free Employment, Department of Labor, will state request was had for hearing before the Commission under Section 12 and hearing has been given and case fully decided.

"Very sincerely yours,
(Signed) "W. Emery Lancaster,
President."

It also alleges that on December 1, 1933, petitioner's said attorney receiver the following letter from John V. Clinnin, one of the Commissioners:

"The Walters case was disposed of, and unless it can be shown that temporaries are doing this work; from our investigation and Dean Curry's statement about payrolls, this is not the case."

"Therefore, the Illinois [illegible] civil [illegible] commission finds the dispensing of the services of [illegible] not [illegible] for political cause as alleged in [illegible] for hearing.

"XIV"

"W. Henry Carmichael, President

"John V. Gilmartin, Member

"Samuel Seaver, Member."

The petitioner further alleges that on September 1, 1[illegible], the petitioned the said commission for an investigation under section 14 of "An Act to regulate the civil service of the State of Illinois." This petition is a lengthy one. [illegible] sought to have the Commission conduct an investigation, under section 14 of the Act, to determine the methods of administration of the Department of Labor of the State of Illinois [illegible] to the State Civil Service Law and the rules of [illegible] pertaining to the position of petitioner, and to take [illegible] "to and that your petitioner may be immediately reinstated [illegible] assigned to duty, and with full compensation [illegible] unlawful lay-off," and for such other action as the [illegible] may deem meet under said section. The petition [illegible] attorney, Michael V. Ryan, received, on November [illegible], the following letter from the Commission:

"My dear Mr. Ryan:

"In answer to your letter of [illegible] in [illegible] of Lillie M. Walker, superintendent of free employment, Department of Labor, will state request was made for hearing before the Commission under section 14 and hearing has been held and case fully decided.

"Very [illegible] yours,
(Signed) "W. Henry Carmichael,
President."

It also alleges that on December 1, [illegible] petitioner received the following letter from John V. [illegible], one of the Commissioners:

"The Walters case was disposed of, and unless it can be shown that temporaries are doing this work; from our investigation and Dean Curry's statement about payrolls, this is not the case."

The petition also alleges that the letter of January 23, 1933, was not signed by the appointing officer and was therefore in violation of Section 12 of the Act.

Upon the oral argument, counsel for petitioner conceded that petitioner, to sustain the judgment, must rely upon the contention that the notice of January 23, 1933, was not in compliance with Section 12 of the Civil Service Act, as the Director of Labor is the appointing officer and the only one authorized under the Act to make removals. The petitioner could not obtain any relief under her petition filed under Section 14. Indeed the Commission had no power under that section to receive and act upon the petition. (See People v. Ames, 360 Ill. 31, 35.) The Commission was fully justified in ignoring that petition and in calling the attention of petitioner's counsel to the fact that her rights had been determined in the proceedings brought under Section 12.

The Attorney General calls attention to the fact that the petitioner requested a hearing under Section 12 of the Act; that her petition shows that her claim for reinstatement was based upon the claim that her removal was made for political causes; that the Commission held that she was not removed for such causes, and "that the action in dispensing with the services of Mrs. Walters was taken in accordance with the program of economy and retrenchment of the Department," and the Attorney General contends that petitioner cannot, after such hearing, change her ground and now contend that she was not discharged by the appointing officer. This contention must be sustained. See the late case of People v. Cohen, 355 Ill. 499, 503, where the question involved in the instant contention is fully discussed and determined.

The Attorney General contends that as the petition for mandamus was not filed until February 2, 1934, the petitioner is barred by laches. It is argued that the delay of more than one year in filing the petition for mandamus is inexcusable, and that "great

The petition also alleges that the letter of January 25, 1935, was not signed by the appointing officer and was therefore in violation of section 12 of the act.

Upon the oral argument, counsel for petitioner [illegible] that petitioner, to sustain the judgment, must rely upon the contention that the notice of January 25, 1935, was not in compliance with section 12 of the Civil Service Act, as the letter of labor is the appointing officer and the only one authorized [illegible] the act to make removals. The petitioner could not obtain any relief under her petition filed under section 14. Indeed, [illegible] no power under that section to receive and act upon the petition. [illegible] People v. Ames, 360 Ill. 31, 36. The [illegible] in ignoring that petition and in quashing the [illegible] counsel to the fact that our [illegible] proceedings brought under section 14.

The Attorney General calls attention to the fact that the petitioner requested a hearing under section 12 of the act, but that her petition shows that her claim for reinstatement [illegible] upon the claim that her removal was made for political [illegible] the Commission held that she was not removed [illegible] that the action in dispensing with the services of [illegible] in accordance with the program of economy [illegible] Department," and the Attorney General contends that [illegible] after such hearing, finding her ground and no [illegible] that she was not discharged by the appointing officer. This [illegible] must be sustained. See the late case of [illegible] v. [illegible] where the question involved in the instant [illegible] was fully discussed and determined.

The Attorney General contends that as the petition for mandamus was not filed until February 3, 1935, the petition is barred by laches. It is argued that the delay of more than one year in filing the petition [illegible]

public detriment and confusion will result from the granting of the writ of mandamus in this case." While there is undoubtedly some force in the position of the Attorney General, nevertheless, we do not deem it necessary to pass upon this contention. We may say, however, that the filing of the petition under Section 14 does not, as petitioner claims, tend to excuse the delay.

The judgment of the Superior court of Cook county is reversed, and the cause is remanded with directions to the trial court to sustain the demurrers of defendants to the petition and to dismiss the petition for mandamus.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

public detainment and confinement will result from the granting of the writ of mandamus in this case. While there is undoubtedly some force in the position of the attorney general, nevertheless, we do not deem it necessary to pass upon this contention. We may say, however, that the filing of the petition under section 14 does not, as petitioner claims, bind us excuse the delay.

The judgment of the superior court of Cook county is reversed, and the cause is remanded with directions to the trial court to execute the demurrers of defendants to the petition and to dismiss the petition for mandamus.

[illegible]

Sullivan and Stone, JJ., concur.

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CHARLES BREYER et al.,
(Plaintiffs) Appellants,

v.

EDNA E. ANDREWS et al.,
Defendants.

CLARA DIERSCHMIDT,
(Defendant) Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

285 I.A. 591

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the instant case a decree of foreclosure and sale was entered on June 25, 1934. On September 6, 1934, Clara Diersohmidt, defendant (appellee), filed her verified petition in the cause, in which she asked:

"1. That the decree of foreclosure heretofore entered in this cause be vacated and set aside;

"2. That the Order approving the Master's Report of Sale and Distribution be vacated and set aside;

"3. That it may be found and declared that the foreclosure in this case is subject to the continuing lien of the note held by petitioner. * * *"

On June 1, 1935, Judge Rush, who did not enter the decree, entered an order, upon the petition, that the decree of foreclosure be vacated and set aside "and all proceedings taken subsequent thereto are held for naught." Plaintiffs appeal from that order.

The bill was filed on April 1, 1932. It was amended on May 4, 1932, by making Clara Dierschmidt (appellee) and Herman Pallas parties defendant to the suit, and Louis D. Glanz, co-complainant. Appellee was duly served with summons on May 12, 1932. On June 14, 1932, another amendment was filed to the bill. On July 12, 1932, appellee was defaulted and the cause

38422

CHARLES BREYER et al., (Plaintiffs) Appellants,	
v.	APPEAL FROM CIRCUIT
EDNA M. ANDREWS et al., Defendants.	COURT OF COOK COUNTY.
CLARA SINGSCHEIDE, (Defendant) Appellee.	

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the instant case a decree of foreclosure and a lien was entered on June 22, 1934. On September 6, 1934, Clara Singscheide, defendant (appellee), filed her verified petition in the cause, in which she asked:

"1. That the decree of foreclosure heretofore entered in this cause be vacated and set aside;

"2. That the Order approving the Master's report of sale and distribution be vacated and set aside;

"3. That it may be found and declared that the foreclosure in this case is subject to the continuing lien of the notes held by petitioner. * * *"

On June 1, 1935, Judge Hugh, who did not enter the decree, entered an order, upon the petition, that the decree of foreclosure be vacated and set aside "and all proceedings taken subsequent thereto are held for naught." Plaintiffs appeal from such order.

The bill was filed on April 1, 1932. It was amended on May 4, 1932, by making Clara Sieroschmidt (appellee) and Herman Pallas parties defendant to the suit, and Louis D. Klaus, co-complainant. Appellee was duly served with summons on May 12, 1932. On June 14, 1932, another amendment was filed to the bill. On July 12, 1932, appellee was defaulted and the cause

was referred to a master in chancery. On March 21, 1934, an amended and supplemental bill was filed making all the defendants who were named in the original bill and the amendments thereto, defendants. The record does not show that appellee was ruled to answer the amended and supplemental bill. No appearance nor answer was ever filed by appellee in the cause. The hearings before the master commenced on July 18, 1932, and the proof was closed on April 13, 1934. On October 19, 1932, appellee testified before the master. On May 11, 1934, the master notified all counsel in the cause, also John E. Owens, one of the solicitors for appellee, that his report had been prepared and that objections might be filed thereto at any time up to and including May 18, 1934, at which time he would take up and dispose of any objections which might be filed. Thereupon appellee, through her solicitors, Owens & Owens, filed with the master the following objections to the report:

"OBJECTIONS OF CLARA DIERSCHMIDT,
ONE OF THE DEFENDANTS HEREIN.

"Now comes Clara Dierschmidt, one of the defendants in the above entitled cause, and objects to the report of Isidore Brown, Master in Chancery, for the following reasons:

"1. That the transcript upon which said Master has based his report is not the true and correct transcript of the testimony taken before said Master.

"2. That the Master is not in possession of all of the original exhibits in this case and therefore the Master erred in making a report wherein he treats copies of instruments to the same effect as though they were the original documents.

"3. For that the Master erred in allowing the complainant to file a copy of a document when the original of such document is not in possession of the complainant.

"4. For that the Master erred in finding that the complainants have a first and prior lien upon the premises involved in this cause.

"Respectfully submitted,

"Clara Dierschmidt."

Thereupon the master formally notified all of the counsel, also Solicitor Owens, that after due consideration of the aforesaid

was referred to a master in chancery. On [illegible]ron 21, 1934, an amended and supplemental bill was filed making all the defendants who were named in the original bill and the amendatory bill, defendants. The record does not show that appellee was ruled to answer the amended and supplemental bill. No appearance nor answer was ever filed by appellee in the cause. The hearing before the master commenced on July 16, 1932, and the proof was closed on April 13, 1934. On October 19, 1932, appellee's solicitor before the master. On May 11, 1934, the master notified all counsel in the cause, also John E. Owens, one of the solicitors for appellee, that his report had been prepared and that objections might be filed thereto at any time up to and including May 18, 1934, at which time he would take up and dispose of any objections which might be filed. Thereupon appellee, through her solicitors, Owens & Owens, filed with the master the following objections to the report:

"OBJECTIONS OF CLARA DIERSCHWEILER,
ONE OF THE DEFENDANTS HEREIN.

"Now comes Clara Dierschweiler, one of the defendants in the above entitled cause, and objects to the report of Walter Brown, Master in Chancery, for the following reasons:

"1. That the transcript upon which said Master based his report is not the true and correct transcript of the testimony taken before said Master.

"2. That the Master is not in possession of all of the original exhibits in this case and therefore the [illegible] in making a report wherein he treats copies of instruments to the same effect as though they were the original documents.

"3. For that the Master erred in allowing the complainant to file a copy of a document when the original of such document is not in possession of the complainant.

"4. For that the Master erred in finding that the complainants have a first and prior lien upon the premises involved in this cause.

"Respectfully submitted,

"Clara Dierschweiler."

Thereupon the master formally notified all of the counsel, also Solicitor Owens, that after due consideration of the aforesaid

objections "and after hearing arguments of counsel in respect thereto," he had reached the conclusion that all of the objections should be overruled, and that they were accordingly overruled. Appellee did not file exceptions to the master's report nor did she take any steps to have the chancellor pass upon her objections to the report. What purports to be her petition (filed September 6, 1934) is as follows:

"IN THE CIRCUIT COURT OF COOK COUNTY

"CHARLES BREYER, et al	)
-vs-	) IN CHANCERY
EDNA E. ANDREWS, et al	) NO. B-239256

"PETITION

"Your petitioner, Clara Dierschmidt, represents to the Court as follows:

"That she is the owner of Note 'W' in the sum of One Thousand Dollars secured by the Trust Deed being foreclosed in this cause;

"Your petitioner was made a party defendant to the Bill of Complaint herein and on April 1, 1932, an amendment was filed subordinating the foreclosure to the lien of the note held by your petitioner; that your petitioner thereupon allowed the bill of complaint to be taken against her as confessed;

"That your petitioner received a letter on August 12, 1934, from the Honorable Isidore Brown, Master in Chancery, in words and figures as follows:

> "'This is to advise you that I have in my possession the sum of $212.67, being the amount due your client (one of the non-depositing bondholders) in the case entitled "Breyer v. Andrews", Circuit Court No. B-239256'.

"That a sale was held in this cause on July 24, 1934, at which the property involved in this cause was sold for the sum of Nine Thousand Dollars and a deficiency taken of Twenty Eight Thousand and Fifteen Dollars.

"That your petitioner filed objections to the Master's report herein but received no notice of the presentation of any decree herein nor did she receive any notice of the presentation of the Master's Report of Sale and Distribution.

"That upon checking the records in the Office of the Clerk of the Circuit Court of Cook County your petitioner ascertained that the complainants herein filed a supplemental bill without notice to your petitioner; that your petitioner was not served with any summons under the supplemental bill; nor given any notice that proofs were to be introduced under the supplemental bill; that all of the proceedings taken in this cause subsequent to the time when

objections "and after hearing arguments of counsel in respect thereto," he had reached the conclusion that all of the objections should be overruled, and that they were accordingly overruled. Appellee did not file exceptions to the master's report nor did she take any steps to have the chancellor pass upon her objections to the report. What purports to be her petition (filed September 6, 1934) is as follows:

"IN THE CIRCUIT COURT OF COOK COUNTY

"CHARLES BRAYER, et al)
-vs-) IN CHANCERY
ROMA A. ANDERSON, et al) NO. B-529256

"PETITION

"Your petitioner, Clara Hieronimus, represents to the Court as follows:

"That she is the owner of Note '4' in the sum of One Thousand Dollars secured by the Trust Deed being foreclosed in this cause;

"Your petitioner was made a party defendant to the Bill of Complaint herein and on April 1, 1934, an amendment was filed subordinating the foreclosure to the lien of the note held by your petitioner; that your petitioner thereupon allowed the bill of complaint to be taken against her as confessed;

"That your petitioner received a letter on August 14, 1934, from the Honorable Isidore Zorn, Master in Chancery, in words and figures as follows:

"'This is to advise you that I have in my possession the sum of $212.07, being the amount due your client (one of the non-depositing bondholders) in the case entitled "Brayer v. Anderson", Circuit Court No. B-529256'.

"That a sale was held in this cause on July 24, 1934, at which the property involved in this cause was sold for the sum of Nine Thousand Dollars and a deficiency taken of Twenty Eight Thousand and Fifteen Dollars.

"That your petitioner filed objections to the Master's report herein but received no notice of the presentation of any decree herein nor did she receive any notice of the presentation of the Master's Report of Sale and Distribution.

"That upon checking the records in the Office of the Clerk of the Circuit Court of Cook County your petitioner ascertained that the complainants herein filed a supplemental bill without notice to your petitioner; that your petitioner was not served with any summons under the supplemental bill; nor given any notice that proofs were to be introduced under the supplemental bill; that all of the proceedings taken in this cause subsequent to the time when

the amended bill of complaint was taken as confessed against your petitioner was a fraud upon the rights of your petitioner and an attempt to prejudice the rights and claim of your petitioner herein.

"WHEREFORE, your petitioner asks:

"1. That the decree of foreclosure heretofore entered in this cause be vacated and set aside;

"2. That the Order approving the Master's Report of Sale and Distribution be vacated and set aside;

"3. That it may be found and declared that the foreclosure in this case is subject to the continuing lien of the note held by petitioner;

"4. That such other and further orders may be entered herein as to the court shall seem meet and just.

"CLARA DIERSCHMIDT

"By S. W. Miller
Her duly authorized agent.

"STATE OF ILLINOIS
COUNTY OF COOK } SS.

"S. W. MILLER being first duly sworn, on oath deposes and says that he is the duly authorized agent in this behalf of Clara Dierschmidt; that he has read the above and foregoing petition by him subscribed, knows the contents thereof, and that the same is true in substance and in fact.

"S. W. MILLER

"Subscribed and sworn to before me
this 6th day of September, A. D. 1934.
- "A. L. Cohn, Notary Public
"(SEAL)"

In the brief for appellee counsel state that the petition is not a motion in the nature of a writ of error coram nobis, nor one in the nature of a bill of review; that "the petition of defendant was filed to vacate a void decree. * * * The trial court in this case was without jurisdiction to adjudicate the rights of the defendant when she was not properly a party to the amended and supplemental bill of complaint;" that appellee, after being defaulted under the original bill, was not bound to take notice of the filing of the amended and supplemental bill; that her rights were fixed at the time the decree pro confesso was taken against her. Appellee

the amended bill of complaint was taken as confessed against your petitioner was a fraud upon the rights of your petitioner and an attempt to prejudice the rights and claim of your petitioner herein.

"WHEREFORE, your petitioner says:

"1. That the decree of foreclosure heretofore entered in this cause be vacated and set aside;

"2. That the Order approving the Master's Report of Sale and Distribution be vacated and set aside;

"3. That it may be found and declared that the foreclosure in this case is subject to the continuing lien of the note held by petitioner;

"4. That such other and further orders may be entered herein as to the court shall seem meet and just.

"[illegible]

"By [illegible]
Its duly authorized agent.

"STATE OF ILLINOIS)
COUNTY OF COOK)ss.

"[illegible] being first duly sworn, on oath deposes and says that he is the duly authorized agent in this behalf of Clara Hieronimidi; that he has read the above and foregoing petition by him subscribed, knows the contents thereof, and that the same is true in substance and in fact.

"[illegible]

"Subscribed and sworn to before me
this 6th day of September, [illegible]
"A. D. Cohn, Notary Public
"(SEAL)"

In the brief for appellee counsel [illegible] that the petition is not a motion in the nature of a writ of error coram nobis, nor one in the nature of a bill of review; that "the petition of defendant was filed to vacate a void decree. * * * The trial court in this case was without jurisdiction to adjudicate the rights of the defendant when she was not properly a party to the amended and supplemental bill of complaint;" that appellee, after being defaulted under the original bill, was not bound to take notice of the filing of the amended and supplemental bill; that her rights were fixed at the time the decree pro confesso was taken against her. Appellee

was the owner of principal note "W," and Herman Pallas was the owner of principal note "K". Louis D. Glanz was the trustee under the trust deed in question. The amended bill contained the allegation, "sold * * * subject to the continuing lien of said trust deed to Louis D. Glanz securing notes K and W." Upon the oral argument it was conceded by appellee's counsel that this allegation accorded appellee a priority to which she was not entitled. The amended and supplemental bill simply corrected the error in the amended bill, and appellee, upon the oral argument, concedes that she lost no rights by reason of the correction. The amended bill, which gave petitioner a prior lien, improperly prejudiced the rights of the owners of certain of the other notes secured by the trust deed. The argument that upon the filing of the amended and supplemental bill the jurisdiction of the person of the appellee was thereby lost and that to again obtain such jurisdiction it was necessary to take out a summons and serve the same upon appellee, is without merit.

"It is a rule of chancery practice that by filing an amended or supplemental bill all previous decretal orders are vacated and the defendants may answer the original and amended or supplemental bill. Such an amended or supplemental bill is held to make a new case and to authorize it to proceed as though a decree pro confesso had not been rendered. The defendant in such case has a right to answer both the original and supplemental bill. (Gibson v. Rees, 50 Ill. 383.) The effect of amending the bill after a decree pro confesso is stated to be, to render the previous order to take the bill pro confesso inoperative even where the purpose of the amendment is to rectify a clerical error. (1 Daniell's Ch. Pl. & Pr. (6th Am. ed.) *425; Weightman v. Powell, 2 DeG. & S. 570.) The effect of amending the bill after a decree pro confesso is to set aside the default without any order of the court. (Gibson v. Rees, supra; Lyndon v. Lyndon, 69 Ill. 43; South Chicago Brewing Co. v. Taylor, 205 id. 132; Ruppe v. Glos, 251 id. 80.)" (Odell v. Levy, 307 Ill. 277, 281.)

"Where a defendant is once brought into court he is required to be present and take notice of every step taken in the progress of the cause. (Mix v. Beach, 46 Ill. 311.) Appellant Arnold was compelled to take notice of the fact that by leave of court appellee might make any amendment necessary to sustain the cause of action for which his suit was intended to be brought. By the service of summons he was brought into court, where it was his duty to be and appear until the case was disposed of, and he

was the owner of principal note "W," and Herman Lathes was the owner of principal note "K". Louis B. Glass was the trustee under the trust deed in question. The amended bill contained the allegation, "said * * * subject to the continuing lien of said trust deed to Louis B. Glass securing notes K and W." Upon the oral argument it was conceded by appellee's counsel that this allegation accorded appellee a priority to which she was not entitled. The amended and supplemental bill simply corrected the error in the amended bill, and appellee, upon the oral argument, concedes that she lost no rights by reason of the correction. The amended bill, which gave petitioner a junior lien, improperly prejudiced the rights of the owners of a claim of the other notes secured by the trust deed. The argument that upon the filing of the amended and supplemental bill the jurisdiction of the person of the appellee was thereby lost and that to again obtain such jurisdiction it was necessary to take out a summon and serve the same upon appellee, is without merit.

"It is a rule of chancery practice that by filing an amended or supplemental bill all previous decretal orders are vacated and the defendants may answer the original and amended or supplemental bill. Such an amended or supplemental bill is held to make a new case and to authorize it to proceed as though a decree pro confesso had not been rendered. The statement in such case has a right to answer both the original and supplemental bill. (Gibson v. Hess, 30 Ill. 383.) The effect of amending the bill after a decree pro confesso is stated to be, to render the previous order to take the bill pro confesso inoperative even where the purpose of the amendment is to rectify a clerical error. (1 Daniell's Ch. Pr. (6th Am. ed.) *425; Weightman v. Jewell 2 Dec. & S. 370.) The effect of amending the bill after a decree pro confesso is to set aside the default without any order of the court. (Gibson v. Hess, supra; Lyndon v. Lyndon, 45 Ill. 43; South Chicago Brewing Co. v. Taylor, 205 Ill. 182; Jungo v. Hise, 251 Ill. 80.)" (Odell v. Levy, 307 Ill. 277, 281.)

"Where a defendant is once brought into court he is required to be present and take notice of every step taken in the progress of the cause. (Mix v. Beach, 40 Ill. 311.) Appellant Arnold was compelled to take notice of the fact that by leave of court appellee might make any amendment necessary to sustain the cause of action for which his suit was intended to be brought. By the service of summons he was brought into court. Thus it was his duty to be and appear until the case was disposed of, and he

was entitled to no further notice or service under the practice in this State. (Niehoff v. People, 171 Ill. 243.)" (Ruppe v. Glos, 251 Ill. 80, 82.)

The proper practice upon the filing of the amended and supplemental bill was for appellants to have had a rule entered requiring appellee to answer the amended and supplemental bill. This was not done. But the failure to do so did not affect the court's jurisdiction as to the person of appellee. While neither appellee nor her counsel ever entered an appearance in the cause, they took part in the hearing before the master. The only objections filed to the master's report were those of appellee, and after they had been overruled they were abandoned. None of the four objections interposed has any bearing upon the question of jurisdiction, although the amended and supplemental bill was filed more than two months before the filing of appellee's objections to the report. The transcript of the evidence shows that because of the filing of the amended and supplemental bill plaintiffs deemed it necessary to re-offer certain evidence. The master's report refers to the amended and supplemental bill and concludes that the allegations of the same have been proven. It appears, therefore, that appellee was fully apprised of the filing of the amended and supplemental bill, and yet she took no steps to answer the same. Indeed, she did not see fit to even file an appearance in the cause.

It will be noted that the petition of appellee is signed, "Clara Dierschmidt By S. W. Miller Her duly authorized agent," and the affidavit in support of it is signed by S. W. Miller, "the duly authorized agent in this behalf of Clara Dierschmidt." It is somewhat difficult to understand how this agent could swear to certain alleged facts that are set up in the petition and upon which appellee relies.

Appellee contends that because appellants made no motion

was entitled to no further notice or service under the practice in this State. (Kilpatrick v. People, 171 Ill. 283.," (Bunge v. Olson, 231 Ill. 80, 82.)

The proper practice upon the filing of the amended and supplemental bill was for appellants to have had a rule entered requiring appellees to answer the amended and supplemental bill. This was not done. But the failure to do so did not affect the court's jurisdiction as to the person of appellee. While neither appellee nor her counsel ever entered an appearance in the cause, they took part in the hearing before the master. The only objections filed to the master's report were those of appellee, and after they had been overruled they were abandoned. None of the four objections interposed has any bearing upon the question of jurisdiction. Although the amended and supplemental bill was filed more than two months before the filing of appellee's objections to the report. The transcript of the evidence shows that because of the filing of the amended and supplemental bill plaintiffs deemed it necessary to re-offer certain evidence. The master's report refers to the amended and supplemental bill and concludes that the allegations of the same have been proven. It appears, therefore, that appellee was fully apprised of the filing of the amended and supplemental bill, and yet she took no steps to answer the same. Indeed, she did not see fit to even file an appearance in the cause.

It will be noted that the petition of appellee is signed, "Clara Dieroehmidt By B. W. Miller Her duly authorized agent," and the affidavit in support of it is signed by "B. W. Miller, "the duly authorized agent in this behalf of Clara Dieroehmidt." It is somewhat difficult to understand how this agent could swear to certain alleged facts that are set up in the petition and upon which appellee relies.

Appellee contends that because appellants made no motion

to strike the petition in the trial court they cannot question its sufficiency in this court. There is, of course, no merit in this contention. The petition did not set forth any grounds giving the court jurisdiction to vacate the decree. It was therefore a nullity, and the question of the lack of jurisdiction can be raised at any time. (See Johnson v. Nelson, 341 Ill. 119, 121.) Where jurisdiction does not exist it cannot be conferred even by consent or acquiescence. (Miller v. Illinois Cent. R. Co., 327 Ill. 103; Larson v. Kahn & Co., 322 Ill. 147; Wishard v. School Directors, 279 Ill. App. 333, 335.) Upon the oral argument counsel for appellee was obliged to take the position that the sole purpose of appellee in having the decree vacated was to enable her to question the amount of attorneys' fees allowed by the master and the decree. The master's report recommended that solicitors' fees in the amount of $2,500 be allowed. None of appellee's objections to the master's report questioned this recommendation. The decree follows the master's report in regard to solicitors' fees. Appellee does not attempt to argue any of the four objections made to the report.

Appellee's petition was predicated, apparently, upon the theory that complainants, in their procedure, had been guilty of fraud upon the rights of appellee. She has been forced to abandon that position, and the contention as to lack of jurisdiction of the person of appellee is now raised. There is not the slightest merit in it. Had appellee appealed from the decree under the record in this cause the decree would have been affirmed. We cannot understand upon what theory of law the chancellor regarded the petition as sufficient to vacate the decree that had been entered by another chancellor months before.

Appellee has filed a motion in this court for a rule on

to strike the petition in the trial court they cannot question its sufficiency in this court. There is, of course, no merit in this contention. The petition did not set forth any grounds giving the court jurisdiction to vacate the decree. It was therefore a nullity, and the question of the lack of jurisdiction can be raised at any time. (See Johnson v. Nelson, 341 Ill. 119, 121.) Where jurisdiction does not exist it cannot be conferred even by consent or acquiescence. (Miller v. Illinois Cent. R. Co., 327 Ill. 103; Larson v. Kahn & Co., 326 Ill. 177; Kimmel v. School Directors, 279 Ill. pp. 338, 335.) Upon the oral argument counsel for appellee was obliged to take the position that the sole purpose of appellee in having the decree vacated was to enable her to question the amount of attorneys' fees allowed by the master and the decree. The master's report recommended that solicitors' fees in the amount of $2,500 be allowed. None of appellee's objections to the master's report questioned this recommendation. The decree follows the master's report in regard to solicitors' fees. Appellee does not attempt to argue any of the four objections made to the report.

Appellee's petition was predicated, apparently, upon the theory that complainants, in their procedure, had been guilty of fraud upon the rights of appellee. She has been forced to abandon that position, and the contention as to lack of jurisdiction of the person of appellee is now raised. There is not the slightest merit in it. Had appellee appealed from the decree under the record in this cause the decree would have been affirmed. We cannot understand upon what theory of law the chancellor regarded the petition as sufficient to vacate the decree that had been entered by another chancellor months before.

Appellee has filed a motion in this court for a rule on

the attorney for appellants to show cause why he should not be held in contempt of court for misquoting the original record in the abstract of record filed in the cause. This motion will be denied.

The order of the Circuit court of Cook county of June 1, 1935, that the decree of foreclosure entered in the cause on June 25, 1934, be vacated and set aside and that all proceedings taken subsequent thereto are held for naught, is reversed.

ORDER OF JUNE 1, 1935, THAT DECREE OF FORECLOSURE ENTERED JUNE 25, 1934, BE VACATED AND SET ASIDE AND THAT ALL PROCEEDINGS TAKEN SUBSEQUENT THERETO ARE HELD FOR NAUGHT, REVERSED.

Sullivan and Friend, JJ., concur.

the attorney for appellants to show cause why he should not be held in contempt of court for his making the original record in the abstract of record filed in the cause. This motion will be denied.

The order of the circuit court of Cook county of June 1, 1955, that the decree of foreclosure entered in the cause on June 25, 1934, be vacated and set aside and that all proceedings taken subsequent thereto are held for nought, is reversed.

ORDER OF JUNE 1, 1955, THAT DECREE OF FORECLOSURE ENTERED JUNE 25, 1934, BE VACATED, IS NOT ADVERSE AND THAT ALL PROCEEDINGS TAKEN SUBSEQUENT THERETO ARE HELD FOR NAUGHT, REVERSED.

Gillivan and Friend, JJ., concur.

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38433

R. B. HAYWARD COMPANY,
a corporation,
Appellant,

v.

THE LUNDOFF-BICKNELL
COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

285 I.A. 591

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a contract action tried by the court without a jury there was a finding and judgment in favor of defendant. Plaintiff has appealed.

Plaintiff's statement of claim alleges that on or about May 17, 1934, plaintiff and defendant entered into an oral contract whereby plaintiff agreed to furnish to defendant certain labor and materials in the installation of ventilation equipment in the Irish Village, that was located in "A Century of Progress Exposition, Chicago," said labor and materials to be furnished and the work completed on or before May 25, 1934; that subsequent thereto plaintiff and defendant orally modified the contract whereby plaintiff agreed to furnish to defendant further and additional labor and materials in the installation of the said equipment, the labor and materials to be furnished and the work completed on or before May 25, 1934; that defendant agreed to pay to plaintiff for the aforesaid labor and materials the sum of $2,496; that plaintiff performed all of the terms and conditions of the contract as modified and furnished to defendant all of the labor and materials on or before May 25, 1934; that, although often requested, defendant has

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R. E. HAYLAND COMPANY,
a corporation,
appellant,

v.

THE LUXOMBY-BIRMINGHAM
COMPANY, a corporation,
appellee.

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

In a contract action tried by the court without a jury there was a finding and judgment in favor of defendant. Plaintiff has appealed.

Plaintiff's statement of claim alleges that on or about May 17, 1934, plaintiff and defendant entered into an oral contract whereby plaintiff agreed to furnish to defendant certain labor and materials in the installation of ventilation equipment in the Irish Village, that was located in the Century of Progress Exposition, Chicago," said labor and materials to be furnished on the work completed on or before May 25, 1934; that subsequent thereto plaintiff and defendant orally modified the contract whereby plaintiff agreed to furnish to defendant further and additional labor and materials in the installation of the said equipment, the labor and materials to be furnished and the work completed on or before May 25, 1934; that defendant agreed to pay to plaintiff for the aforesaid labor and materials the sum of $2,490; that plaintiff performed all of the terms and conditions of the contract as modified and furnished to defendant all of the labor and materials on or before May 25, 1934; that, although often requested, defendant has

failed and refused and still fails and refuses to pay to plaintiff the $2,496, or any part thereof. Attached to the statement of claim is an affidavit of claim. Defendant's verified affidavit of merits is as follows:

"C. M. Norris, being first duly sworn, on oath deposes and says that he is the Vice-President and duly authorized agent of The Lundoff-Bicknell Company, defendant herein; that he has knowledge of the facts; that he verily believes that said defendant has a good and meritorious defense to the whole of plaintiff's claim, and that the nature of said defense is as follows:

"(1) That on, to wit, the 28th day of March, 1934, the defendant, as general contractor, and Irish Village Corporation, as owner, entered into a certain agreement in writing, wherein and whereby the defendant agreed to construct for said owner the Irish Village at the 1934 Century of Progress; that it was agreed that the owner would pay therefor the total construction cost, and that said payments were to be made as follows, to-wit: one-half of the total construction cost on or before May 25, 1934, and the balance on or before August 15, 1934.

"(2) That thereafter the plaintiff and defendant entered into an oral agreement whereby the plaintiff agreed to furnish labor and materials in connection with the installation of ventilation equipment in said Irish Village, and said plaintiff agreed that the defendant would be liable to the plaintiff for the cost of said work, labor and materials as aforesaid only if, when and as payment therefor was received by the defendant from the owner aforesaid.

"(3) That thereafter on, to wit, the 25th day of May, 1934, plaintiff as sub-contractor and defendant as general contractor entered into a certain agreement in writing (a signed copy of which is in the possession of plaintiff) wherein and whereby it was provided, among other things (addendum - Art 15) as follows:

> "'That the Contractor agrees to pay to the Sub-Contractor the total amount of the sub-contract price of One Thousand Eight Hundred Thirty-Five and no/100 ($1,835.00) Dollars if, as and when received from the Owner, it being understood and agreed that all payments made to the Sub-contractor are conditioned upon such payments being made to the Contractor by the Owner.'
>
> "'The sub-contractor shall receive as his share of the payments made by the owner on the herein stipulated dates such proportion of the funds made available as the amount of this sub-contract represents to the total amount of the general contract.'

"(4) That pursuant to the agreements aforesaid the plaintiff furnished and installed the ventilation equipment as required in and by said contract.

"(5) That the defendant has heretofore received from the owner upon the construction contract aforesaid the aggregate sum of $1,265.00, of which the share payable to the plaintiff was the sum of, to wit, $14.89, which sum the defendant on October 10, 1934

failed and refused and still fails and refuses to pay to plaintiff the $2,496, or any part thereof. Attached to the statement of claim is an affidavit, or claim. Defendant's verified affidavit of merits is as follows:

"C. M. Morris, being first duly sworn, on oath deposes and says that he is the Vice-President and duly authorized agent of the Lundoff-Bickmell Company, defendant herein; that he has knowledge of the facts; that he verily believes that said defendant has a good and meritorious defence to the whole of plaintiff's claim and that the nature of said defence is as follows:

"(1) That on, to wit, the 8th day of March, 1934, the defendant, as general contractor, and Irish Village, as owner, entered into a certain agreement in writing, wherein and whereby the defendant agreed to construct for said owner the Irish Village at the 1934 Century of Progress; that it was agreed that the owner would pay therefor the total construction cost, and that said payments were to be made as follows, to-wit: one-half of the total construction cost on or before May 15, 1934, and the balance on or before August 15, 1934.

"(2) That thereafter the plaintiff and defendant entered into an oral agreement whereby the plaintiff agreed to furnish labor and materials in connection with the installation of ventilation equipment in said Irish Village, and said plaintiff agreed that the defendant would be liable to the plaintiff for the cost of said work, labor and materials as aforesaid only in the event and when any payment therefor was received by the defendant from the owner as aforesaid.

"(3) That thereafter on, to wit, the 25th day of May, 1934, plaintiff as sub-contractor and defendant as general contractor entered into a certain agreement in writing, a true copy of which is in the possession of plaintiff, wherein and whereby it was provided, among other things (paragraph - par 15) as follows:

"'That the Contractor agrees to pay to the sub-contractor the total amount of the sub-contract price of one thousand eight hundred thirty-five and no/100 ($1,835.00) Dollars, if, as and when received from the owner, it being understood and agreed that all payments made to the sub-contractor are conditioned upon such payments being made to the contractor by the owner.'

"'The sub-contractor shall rely solely on the ability of the payments made by the owner on the herein mentioned items of such proportion of the funds made available to the account of this sub-contract representing to the total [illegible] general contract.'

"(4) That pursuant to the agreements aforesaid the plaintiff furnished and installed the ventilation equipment [illegible] and by said contract.

"(5) That the defendant has heretofore received from the owner upon the construction contract aforesaid the aggregate sum of $2,265.00, of which the share payable to the plaintiff was the sum of, to wit, $1,4.80, which sum the defendant on October 1, 1934

sent to the plaintiff, and which sum the plaintiff refused to receive and accept.

"(6) That the defendant is not indebted to the plaintiff in the sum of $2,496.00, or any interest upon said sum, or in any sum whatsoever, other than the sum of $14.89, which the defendant has been and is now ready and willing to pay to the plaintiff.

"C. M. Norris"

C. M. Norris, vice-president of defendant company, testified that "Mr. Curtin of our office handled the transaction with plaintiff company relative to their ventilating work at the Irish Village. Mr. Curtin was Chief Estimator of our company and also Purchasing Agent for this job." Defendant concedes that William Kuechenberg, superintendent of plaintiff company, and F. J. Curtin, former chief estimator of defendant company, conducted the negotiations and agreed upon the terms of the oral contract. Kuechenberg and Curtin testified that the oral contract contained no conditional payment provision, and certain documentary evidence corroborates their testimony in that regard. The following is a letter of plaintiff to defendant, dated the day after the making of the oral agreement:

"May 18, 1934

"The Lundoff-Bicknell Co.
100 North LaSalle Street,
Chicago, Illinois.

"Attention: Mr. Curtin

"Gentlemen: Re: IRISH VILLAGE - #460

"We acknowledge yours of May 17th, regarding the above, and thank you for the consideration shown us.

"We confirm understanding with our Mr. Kuechenberg, as follows:

"50% on completion, May 25th, 1934,
Balance, August 15th, 1934.

"Yours very truly,

"R. B. HAYWARD COMPANY
By (signed) R. B. Hayward

"RBH:B"

Defendant did not answer this letter. An invoice sent by plaintiff

sent to the plaintiff, and which sum the plaintiff refused to receive and accept.

"(6) That the defendant is not indebted to the plaintiff in the sum of $2,486.00, or any interest upon said sum, or in any sum whatsoever, other than the sum of $1.38, which the defendant has been and is now ready and willing to pay to the plaintiff.

"C. M. Morris"

C. M. Morris, vice-president of defendant company, testified that "Mr. Curtin of our office handled the transaction with plaintiff company relative to that ventilating work at the Irish Village. Mr. Curtin was Chief Estimator of our company and also Purchasing Agent for this job." Defendant concedes that William Knochenberg, superintendent of plaintiff company, and "J. J. Curtin, former chief estimator of defendant company, continued the negotiations and agreed upon the terms of the oral contract. Knochenberg and Curtin testified that the oral contract contained no additional payment provision, and certain documentary evidence corroborates their testimony in this regard. The following is a letter of plaintiff to defendant, dated the day after the making of the oral agreement:

"May 18, 1934

"The Lundoff-Bickwell Co.
100 North LaSalle Street,
Chicago, Illinois.

"Attention: Mr. Curtin

"Gentlemen: Re: KEISR VILLAGE - 9460

"We acknowledge your of May 17th, regarding the above, and thank you for the consideration shown us.

"We confirm understanding with Mr. Knochenberg, as follows:

"50% on completion, May 25th, 1934,
Balance, August 15th, 1934.

"Yours very truly,

"H. B. HEYWARD COMPANY
By (signed) H. B. Heyward

"HBH:B"

Defendant did not answer this letter. An invoice sent by plaintiff

to defendant contains the following: "Terms of payment, 50% on completion, May 25, 1934, balance, August 15, 1934." It also bears upon its face the approval of the superintendent of defendant. It is conceded by the affidavit of merits and by the testimony of the vice-president of defendant company that "the work of plaintiff company was completed on May 25, 1934," as required by the contract. The contract between defendant and the Irish Village Corporation provides that "half of the total cost of said work, including actual cost, plus ten per cent (10%) thereof, shall be paid by the Owner to the Contractor on or before May 25, 1934," and further provides that the entire amount due under the contract shall be paid on or before August 15,1934. The Irish Village Corporation defaulted in the payment due defendant - approximately $55,000 - on May 25, 1934. Thereupon the vice-president of defendant company sent to plaintiff, through the mails, a letter and a "Sub-Contract," which latter purports to be an agreement between the parties covering the work that had already been completed by plaintiff company under the oral agreement. The "Sub-Contract" is a lengthy one, partly printed and partly typewritten. One of the many terms and provisions contained therein is the following:

"Addendum.

"ARTICLE XV: It is further understood and agreed by and between the parties hereto, as follows:

"That, the Contractor agrees to pay to the Sub-Contractor the total amount of the sub-contract price of One Thousand Eight Hundred Thirty-five and no/100 ($1,835.00) Dollars if, as and when received from the Owner, it being understood and agreed that all payments made to the Sub-Contractor are conditioned upon such payments being made to the Contractor by the Owner. * * *"

The letter reads as follows:

"May 25, 1934.

"R. B. Hayward Company,
1714 Sheffield Avenue,
Chicago.

"Gentlemen:- Re: Irish Village - #460

"We are attaching hereto four (4) copies of sub-contract #460-49

to defendant contains the following: "Terms of payment, 90% on completion, May 25, 1934, balance, August 1, 1934." The sum upon its face the approval of the superintendent of defendant. It is conceded by the affidavit or merits and by the testimony of the vice-president of defendant company that "the work of plaintiff company was completed on May 25, 1934," as required by the contract. The contract between defendant and the Irish Village Corporation provides that "half of the total cost of said work, including extra cost, plus ten per cent (10%) thereof, shall be paid by the Owner to the Contractor on or before May 25, 1934." An further provides that the entire amount due under the contract will be paid on or before August 15, 1934. The Irish Village Corporation defaulted in the payment due defendant - approximately $8,000 - on August 15, 1934. Thereupon the vice-president of defendant company sent to plaintiff, through the mails, a letter and a "Sub-Contract," which letter purported to be an agreement between the parties covering the work that had already been completed by plaintiff company under the oral agreement. The "Sub-Contract" is a lengthy one, partly printed and partly typewritten, and the many terms and provisions contained therein is as follows:

"Addendum.

"ARTICLE XV: It is further understood and agreed by and between the parties hereto, as follows:

"That, the Contractor agrees to pay to the Sub-Contractor the total amount of the sub-contract price, to wit: Thousand Eight Hundred Thirty-Five and no/100 ($1,835.00) Dollars if, and when received from the Owner, it being understood and agreed that the payments made to the Sub-Contractor are contingent upon such payments being made to the Contractor by the Owner."

The letter reads as follows:

"May 25, 1934.

"E. D. Hayward Company,
1714 Sheffield Avenue,
Chicago.

"Gentlemen: Re: Irish Village - 400

"We are attaching hereto four (4) copies of sub-contract #400-40

covering the VENTILATION for the above named project.

"If the terms and conditions as outlined therein meet with your approval, please have all four copies signed by your President, Vice President, or Treasurer, have the signature witnessed and your corporate seal attached. If you will then return all four copies to us we will affix our signature and return one copy to you for your files.

"Please note particularly Article IV which instructs you not to assign nor sublet any part of this work without written approval. We must insist that these instructions be adhered to.

"Yours very truly,

"THE LUNDOFF-BICKNELL CO.
By (signed) C. M. NORRIS

"C. M. Norris
Vice President

"nr
Encl. 4
#460"

The president of plaintiff company, without reading the "Sub-Contract" carefully, signed it and returned it to defendant company. He testified that he did not notice the conditional terms of payment stated in Article XV until June or July. Defendant received the signed "Sub-Contract" from plaintiff on May 29, 1934. It then signed it, by its vice-president, and sent to plaintiff the following letter:

"May 29th, 1934.

"R. B. Hayward Company,
1714 Sheffield Avenue,
Chicago, Illinois.

"Gentlemen:

"RE:-IRISH VILLAGE - 460.

"We are sorry to advise you that the Owners of the Irish Village Corporation have defaulted on the 50% payment due us under our contract on May 25th, 1934. Inasmuch as payment to you on your contract with us is contingent upon the receipt of these funds from the Owners no payment can be made you at this time.

"We have taken steps to protect your interest and ours to the fullest extent possible. As soon as the exact procedure to be followed is decided upon we will advise you further.

"Yours very truly,

"THE LUNDOFF-BICKNELL CO.
By (signed) C. M. Norris
"C. M. Norris
Vice President.

"CMN.C."

covering the VENTILATION for the above named project.

"If the terms and conditions as outlined therein meet with your approval, please have all four copies signed by your President, Vice President, or Treasurer, have the signature witnessed and your corporate seal attached. If you will then return all four copies to me we will affix our signature and return one copy to you for your files.

"Please note particularly Article IV which invests you not to assign nor sublet any part of this work without written approval. We must insist that those instructions be adhered to.

"Yours very truly,

"THE LUNDQUIST-BICKNELL CO.,
By (signed) C. M. Morris

"C. M. Morris
Vice President

"mr
Encl. 4
#460"

The president of plaintiff company, without [illegible] the "Sub-contract" carefully, signed it and returned it to [illegible] company.

He testified that he did not notice the contractural terms of agreement stated in Article XV until June or July. [illegible] received the signed "Sub-contract" from plaintiff [illegible], 1924. [illegible] signed it, by its vice-president, and [illegible] following letter:

"May 27th, 1924.

"E. B. Hayward Company,
1214 Sheffield Avenue,
Chicago, Illinois.

"Gentlemen:

"RE:-Lincoln Village - 460.

"We are sorry to advise you that the Owners of the Lincoln Village Corporation have defaulted on the 20th payment due us under our contract on May 15th, 1924. Inasmuch as payment to you on your contract with us is contingent upon the receipt of these funds from the Owners no payment can be made you at this time.

"We have taken steps to protect your interest and our [illegible] fullest extent possible. As soon as the exact procedure to be followed is decided upon we will advise you further.

"Yours very truly,

"THE LUNDQUIST-BICKNELL CO.,
By (signed) C. M. Morris
"C. M. Morris
Vice President.

"CMM.C."

Plaintiff's theory of the case is "that the ventilating work was done on defendant's direct promise to pay under the oral contract, entered into between the parties. The contract price of $2,496 is admitted as is the fact of the work being fully completed prior to the execution by either party of the written contract in which defendant's liability is made conditional. On this premise, plaintiff claims the written contract constitutes a new undertaking of the parties, and must therefore be supported by independent or additional consideration;" that it is not disputed that there was no consideration for the alleged written contract; that it is elementary law that consideration for a contract must be pleaded and proved; that defendant failed entirely in this regard and that the trial court erred in overruling the motion of plaintiff, made at the close of all the evidence, that the alleged written contract be excluded. Defendant concedes "that the plaintiff furnished the work, labor and material pursuant to an oral agreement, but alleges that it was agreed and understood between the parties that the defendant would pay the plaintiff for the work only when, as and if it received payment therefor from the Irish Village Corporation, the owner. * * * The sole question before the court is, therefore, whether the trial court erred in receiving in evidence the signed contract of May 25, 1934. Whether or not the contract was technically valid either per se or as a confirmation of an oral agreement is not material. Its value lies in the light which it sheds upon the true nature of the disputed oral agreement, and, whether we view it as a contract, or as an admission by the plaintiff against its interest in this suit, it had undoubted significance;" and argues that "the contract of May 25, 1934, was the reduction to writing by the parties of the oral agreement previously entered into and upon which suit was brought." In its affidavit of merits

Plaintiff's theory of the case is "that the ventilating work was done on defendant's direct promise to pay under the oral contract, entered into between the parties. The contract price of $2,495 is admitted as is the fact of the work being fully completed prior to the execution by either party of the written contract in which defendant's liability is made conditional. On this premise, plaintiff claims the written contract constitutes a new undertaking of the parties, and must therefore be supported by independent or additional consideration;" that it is not disputed that there was no consideration for the alleged written contract; that it is elementary law that consideration for a contract must be pleaded and proved; that defendant failed entirely in this regard and that the trial court erred in overruling the motion of plaintiff, made at the close of all the evidence, that the alleged written contract be excluded. Defendant concedes "that the plaintiff furnished the work, labor and material pursuant to an oral agreement, but alleges that it was agreed and understood between the parties that the defendant would pay the plaintiff for the work only when, and if it received payment therefor from the Lake Village Corporation, the owner. * * * The sole question before the court is, therefore, whether the trial court erred in receiving in evidence the signed contract of May 25, 1934, whether or no, the contract was technically valid either per se as a confirmation of an oral agreement is not material. Its value lies in the light it sheds upon the true nature of the disputed oral agreement, and, whether we view it as a contract, or as an admission by the plaintiff against its interest in this suit, it had undoubted significance;" and argues that "the contract of May 25, 1934, was the conclusion to writing by the parties of the oral agreement previously entered into and upon which suit was brought." In its activity of merits

defendant alleges that there were two agreements, one oral and one written, and that in both plaintiff agreed that defendant would be liable to plaintiff for the cost of the work, labor and materials only if, when and as payment therefor was received by defendant from the owner aforesaid. At the conclusion of all of the evidence defendant moved "to exclude all testimony relative to oral agreements on the ground that the contract was merged in the written agreement." The trial court reserved ruling upon this motion, but in his opinion deciding the case he did not pass upon it. It will be seen, therefore, that defendant has not been consistent in its position as to the nature and effect of the so-called written agreement. In deciding the case the court rendered the following opinion:

"The Court: Now, it would serve no good purpose for this Court to take up the question of the truthfulness of any witness. Therefore, I am not going to go into the evidence at all. Suffice it to say that in my opinion I am controlled by this contract or by this paper introduced in evidence and not by any idea of a verbal contract by the parties. That was signed by the president of the plaintiff company, and I must look to them for the burden, - I will put it that way, if you wish, on which side the burden is. And that, to my mind, has been shifted to the defendant to such an extent that I am inclined to feel that the paper negatives about what the original verbal contract was, and that being so, I do not think the plaintiff has made out his case by a preponderance of the evidence.

"Therefore, there must be a finding in behalf of the defendant."

That the written document of May 25, 1934, cannot be sustained as a new agreement is not disputed, and defendant is finally forced to the position that the written document was "a reiteration or confirmation of the oral agreement of the parties." We have no difficulty in finding from the evidence that the oral agreement between the parties contained no conditional payment provision, and that the written document was but a part of a scheme of defendant to evade meeting its obligations to plaintiff, evolved after Irish Village Corporation had defaulted in its payments to defendant. The

defendant alleges that there were two agreements, one oral and one written, and that in both plaintiffs agreed that defendant would be liable to plaintiff for the cost of the work, labor and materials only if, when and as payment therefor was received by defendant from the owner aforesaid. At the conclusion of all of the evidence defendant moved "to exclude all testimony relative to oral agreements on the ground that the contract was merged in the written agreement." The trial court reserved ruling upon this motion, but in his opinion deciding the case he did not pass upon it. It will be seen, therefore, that defendant has not been consistent in its position as to the nature and effect of the so-called written agreement. In deciding the case the court rendered the following opinion:

> "The Court: Now, it would serve no good purpose for this Court to take up the question of the truthfulness of any witness. Therefore, I am not going to go into the evidence at all. Suffice it to say that in my opinion I am controlled by this contract or by this paper introduced in evidence and not by any loss of a verbal contract by the parties. That was signed by the president of the plaintiff company, and I must look to them for the burden. - I will put it that way, if you wish, on which side the burden is. And that, to my mind, has been shifted to the defendant to such an extent that I am inclined to feel that the paper negatives about what the original verbal contract was, and that being so, I do not think the plaintiff has made out his case by a preponderance of the evidence.
>
> "Therefore, there must be a finding in behalf of the defendant."

That the written document of May 28, 1924, cannot be sustained as a new agreement is not litigated, and defendant is finally forced to the position that the written document is "a restatement or confirmation of the oral agreement of the parties." We have no difficulty in finding from the evidence that the oral agreement between the parties contained no conditional payment provision, and that the written document was but a part of a scheme of defendant to evade meeting its obligations to plaintiff, evolved after Irish Village Corporation had defaulted in its payments to defendant. The

intent of defendant to obtain an unfair advantage of plaintiff is obvious from the undisputed facts and circumstances. If we assume, however, that defendant's contention that the written document was competent evidence and must be considered in determining the terms of payment under the oral agreement is correct, nevertheless, we are satisfied, after a consideration of all the facts and circumstances in proof, that plaintiff has proved its case by a preponderance of the evidence.

The judgment of the Municipal court of Chicago is reversed, and judgment will be entered here in favor of plaintiff and against defendant in the sum of $2,496.

JUDGMENT REVERSED, AND JUDGMENT HERE IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN THE SUM OF $2,496.

Sullivan and Friend, JJ., concur.

intent of defendant to obtain an unfair advantage of plaintiff is obvious from the undisputed facts and circumstances. If so, however, that defendant's contention that the written document was competent evidence and must be considered in determining the terms of payment under the oral agreement is correct, nevertheless, we are satisfied, after a consideration of all the facts and circumstances in proof, that plaintiff has proved its case by a preponderance of the evidence.

The judgment of the municipal court of Ohio-no is reversed, and judgment will be entered here in favor of plaintiff and against defendant in the sum of $3,496.

JUDGMENT REVERSED, AND JUDGMENT HERE IN FAVOR
OF PLAINTIFF AGAINST DEFENDANT IN THE SUM
OF $3,496.

Sullivan and Friend, JJ., concur.

38454

DAVID KAHN, INC., a corporation,
Appellant,

v.

SALES STIMULATORS, INC., a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

285 I.A. 592

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal to reverse a judgment for $209.02 in favor of defendant on its plea of setoff and for the entry of a judgment here against defendant for $1,751.95. The case was tried before the court without a jury.

The amended complaint alleges that plaintiff received from defendant the following order, under date of May 1, 1933:

"Please enter our order for 400 gross of fountain pens of the same kind and quality as we have been receiving from you. * * *

"These fountain pens are to be delivered to us at the rate of 50 gross per month to be shipped on the 15th of each month. * * *

"The price is to be $34.00 per gross. Net #154

"Kindly sign and return to us the duplicate of this order which is enclosed to signify your acceptance."

The amended complaint further alleges that plaintiff accepted the order and on May 15, 1933, delivered to defendant 50 gross of pens, of a value of $1,700; that on June 10, 1933, defendant ordered plaintiff to ship no more pens until further notice, which order was accepted by plaintiff; that plaintiff delivered, upon orders of defendant, 155 gross of pens, at a total contract price of $5,270.95; that defendant paid, on account, the sum of $3,519, leaving a balance due of $1,751.95; that on November 6, 1933,

38434

DAVID RAMM, INC., a cor- poration, Appellant,	[illegible]
v.	[illegible]
BAINS STIMULATORS, INC., a corporation, Appellee.	

MR. PRESIDING JUSTICE SCALES delivered the opinion of the court:

An appeal to reverse a judgment for $[illegible],00 in favor of defendant on its plea of setoff and for the entry of a judgment here against defendant for $1,781.95. The case was tried before the court without a jury.

The amended complaint alleges that plaintiff received from defendant the following order, under date of May 1, 1952:

"Please enter our order for 400 gross of fountain pens of the same kind and quality as we have been [illegible]

"These fountain pens are to be delivered [illegible] gross per month to be shipped on [illegible] month.

"The price is to be $24.00 per gross, net 10d

"Kindly sign and return to us one duplicate of this order which is enclosed to signify your acceptance."

The amended complaint further alleges that plaintiff accepted the order and on May 15, 1952, delivered to defendant 55 gross of pens, of a value of $1,760; that on June 1, 1952, defendant ordered plaintiff to ship no more pens until further notice, which order was accepted by plaintiff; that plaintiff delivered, upon orders of defendant, 165 gross of pens, at a total contract price of $3,270.95; that defendant paid, on account, the sum of $4[illegible],19, leaving a balance due of $1,781.45; that on November [illegible], 1952,

defendant ordered 50 gross of pens and plaintiff offered to deliver the same provided defendant paid the said balance; that defendant refused to pay said balance and notified plaintiff that it would accept no more deliveries of pens and cancelled the contract; that there was due and owing to plaintiff an unpaid balance of $1,751.95, with interest at five per cent from September 28, 1933.

Defendant's answer admits the contract set out in the complaint; admits that on June 10, 1933, defendant directed plaintiff to ship no more pens until further notice; admits the delivery to defendant of the pens set up in the complaint and that there is a balance of $1,751.95 due plaintiff, subject to credits due defendant on account of plaintiff's breach of the contract; admits that on November 6, 1933, it ordered 50 gross of pens, but denies that plaintiff offered to ship and deliver same provided defendant paid plaintiff the balance due, and alleges that on November 8, 1933, plaintiff advised defendant that it could not ship the pens due under the contract because of the increase in the price of gold; denies that it cancelled the contract, and states that plaintiff advised defendant, on September 6, 1933, that it would make no further shipments beyond 50 gross, which were afterward shipped, and gave as its reason for its action the increase in the price of gold; that plaintiff by its action, on November 8, 1933, breached its contract. Defendant further denies that there is any sum due plaintiff, and alleges that there is a large sum due defendant by reason of the breach of contract set up in its counterclaim. The counterclaim alleges that it is in the business of selling, through its solicitors, items to retail merchants to be used by them as premiums; that plaintiff, because of past dealings, was familiar with defendant's sales plan; that on May 1, 1933, to protect itself against the prospective rise in the price of pens, defendant entered into the contract with

defendant ordered 50 gross of pens and plaintiff offered to deliver the same provided defendant paid the sale bonuses; that defendant refused to pay said balance and notified plaintiff that it would accept no more deliveries of pens and cancelled the contract; that there was due and owing to plaintiff an unpaid balance of $1,781.05, with interest at five per cent from December 25, 1932.

Defendant's answer admits the contract set out in the complaint; admits that on June 16, 1932, defendant notified plaintiff to ship no more pens until further notice; admits the delivery to defendant of the pens set up in the complaint and that there is a balance of $1,781.05 due plaintiff, subject to credits due defendant on account of plaintiff's breach of the contract; admits that on November 6, 1932, it ordered 50 gross of pens, but denies that plaintiff offered to ship and deliver same provided defendant paid plaintiff the balance due, and alleges that on November 8, 1932, plaintiff advised defendant that it could not ship the pens due under the contract because of the increase in the price of coal; denies that it cancelled the contract, and states that plaintiff advised defendant, on December 6, 1932, that it would make no further shipments beyond 50 gross, which were afterward shipped, and gave as its reason for its action the increase in the price of coal; that plaintiff by its action, on November 8, 1932, breached its contract. Defendant further denies that there is any sum due plaintiff, and alleges that there is a large sum due defendant by reason of the breach of contract set up in its counterclaim. The counterclaim alleges that it is in the business of selling, through its salesmen, items to retail merchants to be used by them as premiums; that plaintiff, because of past dealings, was familiar with defendant's sales plan; that on May 1, 1932, to protect itself against the prospective rise in the price of pens, defendant entered into the contract with

complainant; that on September 6, 1933, plaintiff advised defendant that it would refuse to ship any further pens except 50 gross which it had on hand, and gave as a reason for the refusal the rise in the price of pens due to the increase in the cost of gold used in the pen points; that on September 28 plaintiff delivered to defendant the said 50 gross of pens; that on November 6, 1933, defendant requested plaintiff to ship an additional 50 gross and on November 8 plaintiff refused to ship any more pens and advised defendant that it could not ship any more pens because of the increase in the price of gold, thereby breaching its contract with defendant; that defendant withheld payment of the balance because of the failure and refusal of plaintiff to ship the additional pens; that defendant, because of the advancing price of pens, sustained damages in the sum of $6,370, the difference between the contract price and the market price of the pens at the time when delivery of the same was due; that plaintiff is entitled to have the unpaid balance of $1,624.22 credited against the sum of $6,370, and that there is now due and owing to defendant from plaintiff $4,745.78.-

The material parts of plaintiff's answer to the counterclaim are as follows: That on June 10, 1933, at the request of defendant, it was agreed that plaintiff was to ship no more pens until notified to do so by defendant; that on November 6, 1933, defendant ordered 50 gross of pens and plaintiff offered to deliver the same upon payment by defendant of the past due indebtedness, $1,751.95; that defendant refused to pay the same and plaintiff refused to ship any more pens until the balance was paid; that thereafter defendant ordered no more pens although plaintiff offered to deliver all the remaining pens at the contract price; that on September 6, 1933, when plaintiff advised defendant that it would make no more shipments except the 50 gross, it believed that it had the right to

complainant; that on September 6, 1934, plaintiff advised defendant that it would refuse to ship any further pens except 50 gross which it had on hand, and gave as a reason for the refusal the rise in the price of pens due to the increase in the cost of gold used in the pen points; that on September 28 plaintiff delivered to defendant the said 50 gross of pens; that on November 1, 1934, defendant requested plaintiff to make an additional 50 gross and on November 8 plaintiff refused to ship any more pens and advised defendant that it would not ship any more pens because of the increase in the price of gold, thereby terminating its contract with defendant; that defendant withheld payment of the balance because of the failure and refusal of plaintiff to ship the additional pens; that defendant, because of the prevailing price of pens, sustained damages in the sum of $8,[illegible], the difference between the contract price and the market price of the pens at the time when delivery of the same was due; that plaintiff is entitled to have the unpaid balance of $1,6[illegible] credited against the sum of $8,[illegible], and that there is now due and owing to defendant from plaintiff $4,708.78.

The material parts of plaintiff's answer to the counterclaim are as follows: That on June 1, 1933, at the request of defendant, it was agreed that plaintiff would ship no more pens until notified to do so by defendant; that on November 1, 1934, defendant ordered 50 gross of pens and plaintiff offered to deliver the same upon payment by defendant of the past due indebtedness, $1,[illegible]; that defendant refused to pay the same and plaintiff refused to ship any more pens until the balance was paid; that thereafter defendant ordered no more pens although plaintiff offered to deliver all the remaining pens at the contract price; that on September 6, 1934, when plaintiff advised defendant that it would make no more shipments except the 50 gross, it believed that it had the right to

refuse delivery because the United States had gone off the gold standard and the federal government controlled gold; that on September 7, 1933, defendant and plaintiff agreed that defendant should submit the entire proposition to its attorneys and if it was advised by them that the NRA and the federal control of gold did not vitiate the contract between plaintiff and defendant, plaintiff would thereupon deliver to defendant the remaining portion of the fountain pens; that defendant ordered no more pens until November 6, 1933, and on November 14, 1933, notified plaintiff that it would give plaintiff 10 days in which to make delivery of 50 gross of pens; that within the 10 days, plaintiff notified defendant that it would make delivery of said 50 gross of pens and all other pens ordered by defendant provided that defendant would pay to plaintiff the sum of $1,751.95 then due and owing by defendant to plaintiff for pens previously delivered; that defendant refused to make the payment and cancelled the contract. Plaintiff further alleges that defendant sustained no damage because of any failure or refusal to ship pens.

The trial court based its finding for defendant upon the theory that plaintiff breached the contract. Plaintiff contends that while it served notice on defendant of an intention to breach the contract such notice is not of itself a breach; that it would have become so if it had been accepted by defendant as such, but that defendant, upon the receipt of the notice, declined to accept it as a breach and kept the contract alive by giving plaintiff ten days' time in which to perform, and that within said time plaintiff notified defendant by telephone and by written communication that it would perform its part of the contract provided defendant would pay plaintiff its past due obligation under the contract; that defendant failed to make such payment, refused to accept any more

refuse delivery because the United States had gone off the gold standard and the federal government confiscated gold; that on September 7, 1933, defendant and plaintiff agreed that defendant should submit the entire proposition to the attorneys and if it was advised by them that the WA and the federal control of gold did not vitiate the contract between plaintiff and defendant, plaintiff would thereupon deliver to defendant the remaining portion of the fountain. Agreed that defendant ordered no more pens until November 6, 1933, and on November 14, 1933, notified plaintiff that it would give plaintiff 15 days in which to make delivery of 50 gross of pens; that within the 15 days, plaintiff notified defendant that it would make delivery of the 50 gross of pens and all other pens ordered by defendant, providing that defendant would pay to plaintiff the sum of $1,750.00 for the pens owing by defendant to plaintiff for pens previously delivered; that defendant refused to make the payment and cancelled the contract. Plaintiff further alleges that defendant sustained no damage because of any failure or refusal to ship pens.

The trial court based its finding for defendant on the theory that plaintiff breached the contract. Plaintiff contends that while it served notice on defendant of its intention to breach the contract such notice is not of the kind or character it would have become so if it had been accepted by defendant as well, but that defendant, upon the receipt of the notice, failed to accept it as a breach and kept the contract alive by giving plaintiff ten days' time in which to perform, and within said time plaintiff notified defendant by telegram and by written communication that it would perform its part of the contract provided defendant would pay plaintiff the past due obligation under the contract; that defendant failed to make such payment, refused to accept any more

pens, and cancelled the contract; that plaintiff, under the facts, had the right to insist upon payment of the past due indebtedness before it made further deliveries under the contract; that under the undisputed facts plaintiff did not breach the contract.

The law bearing on the case is well settled. Where a contracting party gives notice of his intention not to comply with the obligation of the contract, the other contracting party may accept such notice as an anticipatory breach, and sue for damages without waiting until the time for the completion and fulfillment of such contract, by its terms; but in order to enable him to sue on such an anticipatory breach, he must accept it as such and consider the contract at an end. (Shields v. Carson, 102 Ill. App. 38; Central Funding Co. v. Gibson, 206 Ill. App. 236.) A mere notice of an intended breach of a contract is not of itself a breach, though it may become so if accepted and acted upon as such by the other party, yet if not so accepted and acted upon the notice remains only a matter of intention and may be withdrawn at any time before performance is in fact due. (Alvey-Ferguson Co. v. Ernst Tosetti Brewing Co., 178 Ill. App. 536.) A contract continues in force notwithstanding default, where the party against whom the default is made affirmatively so treats it. (Hibernian Banking Ass'n v. Eckhart & Swan Milling Co., 140 Ill. App. 479.) A failure to pay for installments will justify refusal to proceed until payment has been made. (Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623, 627; Hess Co. v. Dawson, 149 Ill. 138; Finch & Co. v. New Ohio W. Coal Co., 156 Ill. App. 589, 599.)

It is a comparatively easy matter to decide the case from certain letters in evidence. The record shows that in the fall of 1933 this country went off the gold standard and the federal government by regulation prohibited citizens from possessing or using gold except by government permit, and fixed the price of

pens, and concluded the contract that [illegible], under the facts, had the right to insist upon payment. [illegible] before it made further delivery and [illegible] the undisputed facts plaintiff did not [illegible].

The law declares [illegible] transacting party gives notice of his intention not to comply with the obligation of the contract, the other contracting party may accept such notice as an anticipatory breach, and [illegible] without waiting until the time for the completion [illegible] such contract, by its terms, but it [illegible] in no way [illegible] an anticipatory breach, [illegible] contract at an end. (Whitehead v. Gibson, [illegible] Mining Co. v. Gibson, 206 Ill. [illegible] 45.) [illegible] intended breach of a contract is not [illegible], though it may become so if accepted and acted upon [illegible], yet if not so accepted and acted upon the notice is only a matter of intention and may [illegible] formance is in fact due. (Lyon v. [illegible] Co., 178 Ill. App. 336.) [illegible] standing default, where the party [illegible] affirmatively so treats it. (Illinois Banking [illegible] Swan Milling Co., 140 Ill. App. 479.) [illegible] establishments will justify refusal to proceed until [illegible] made. (Chicago Sanitary Coal Co. v. [illegible]; Moss Co. v. Dawson, 140 Ill. [illegible] Coal Co., 186 Ill. App. 505, 508.)

It is a comparatively easy matter [illegible] certain letters in evidence. [illegible] of 1933 this country went off the gold standard [illegible] government by regulation prohibited citizens from possessing or using gold except by government permit, and fixed the price of

gold at $31 an ounce. Every manufacturer was compelled to notify the government of the amount of gold it had on hand and obtain a license to use it in order to manufacture pen points and other similar articles, and the amount that each manufacturer was permitted to use was limited. It further appears that the price fixed by the government for gold increased the cost of manufacturing the pen points $8 per gross. Plaintiff sent to defendant the following letter, dated September 6, 1933:

"With reference to your dated May 1st, wish to advise you that we have 50 gross gold points on hand which we can deliver to you at the price at which the order was taken. We have received an increase today of $8.00 per gross more on the points due to the rise in gold. That is today's price, and it does not hold because we do not know what tomorrow's or the next day's price will be. Gold is selling at $31.00 an ounce, and the price may go to $40.00 or more. Therefore, we wish to advise that all we can deliver to you is the 50 gross pens.

"Please advise us at once whether you want the 50 gross to be shipped to you.

"We are also enclosing herewith statement, and would ask you to kindly send us a check on same."

Defendant sent the following answer to that letter, under date of September 8, 1933:

"We are enclosing our check in payment of half of your invoice.

"You may ship us the fifty gross of pens immediately. We will use the balance of four hundred gross which we contracted for and, of course, the matter of price has already been settled. You will remember that when you were in Chicago, you told me that you had purchased pen points for the four hundred gross of pens and naturally, any raise in price of gold will not affect our order. You know, of course, that we have contracted to furnish our merchants with pens at a definite price and it would be impossible for us to ask them to pay more now. If we did, they would simply discontinue the use of our plan and we would have to give up the deal entirely. It was in order to prevent anything of this kind happen that we placed the order with you for four hundred gross of pens in May. If you will refer to our letter of April 22, you will find this matter fully explained.

"Please send the fifty gross immediately as we are in need of pens now."

Upon receipt of that letter plaintiff's vice president came to Chicago and saw defendant's president, and the matter of the gold situation was discussed. As a result the parties agreed that

gold at $31 an ounce. Very manufacturer was compelled to notify the government of the amount of gold it had on hand and obtain a license to use it in order to manufacture pen points or other similar articles, and the amount that each manufacturer was permitted to use was limited. It further appears that the price fixed by the government for gold increased the cost of manufacturing the pen points $8 per gross. Plaintiff sent to defendant the following letter, dated September 6, 1933:

"With reference to your dated July 1st, [illegible] we have 50 gross gold points on hand which [illegible] to you at the price at which the order was taken. [illegible] received an increase today of $8.00 per gross more on [illegible] the rise in gold. What is today's price, as [illegible] because we do not know what [illegible] price will be. Gold is selling at $31.50 an ounce, and the price may go to $40.00 or more. Therefore, we wish to [illegible] can deliver to you is the 50 gross [illegible]

"Please advise us at once whether you [illegible] 50 gross to be shipped to you.

"We are also enclosing herewith statement, [illegible] you to kindly send us a check on account."

Defendant sent the following answer to that letter, under date of September 8, 1933:

"We are enclosing our check in payment [illegible] of your invoice.

"You may ship us the fifty gross of [illegible] at [illegible]. We will use the balance of four hundred [illegible] contracted for and, of course, the matter of price [illegible] settled. You will remember that when you were in [illegible] you said we that you had purchased pen points for the four hundr[illegible] of pens and naturally, any raise in price of gold will not affect our order. You know, of course, that we have [illegible] to maintain our merchandise with pens [illegible] and it would be impossible for us to ask them to pay more [illegible] did, they would simply discontinue the use of our [illegible] to give up the deal entirely. It was in order to prevent anything of this kind happen that we placed the order [illegible] four hundred gross of pens in May. If you will [illegible] our letter of April 22, you will find this matter [illegible].

"Please send the fifty gross immediately [illegible] are in need of pens now."

Upon receipt of that letter plaintiff's vice president came to Chicago and saw defendant's president, and the matter of the gold situation was discussed. As a result the parties agreed that

defendant should confer with its attorney in reference to the situation and if the attorney gave an opinion that the NRA and the federal control of gold did not entitle plaintiff to cancel the contract plaintiff would stand the loss and deliver the remaining portion of the pens. Some time later defendant sent the following letter to plaintiff, dated November 6, 1933:

"We have not as yet received the fifty gross of pens which you were to have shipped us during the month of October. Will you please ship us as quickly as possible thirty gross of men's pens and twenty gross of ladies'.

"Please write us immediately and let us know how soon we can expect these pens."

It will be noted that defendant in that letter makes no mention of a conference with its attorney. To that letter plaintiff's vice president, on November 8, 1933, replied as follows:

"We are in receipt of your letter of Nov. 6th in which you ask for 50 gross pens.

"We wish to advise you again that we cannot ship you these pens due to the increase in prices on gold. We are quite sure that we have talked this matter over very clearly with you when last in Chicago, and you were supposed to advise me on this matter when you received your information.

"We can only quote you on these pens from day to day inasmuch as there is no set price on gold, and increases in gold vary from day to day." (Italics ours.)

Defendant, under date of November 14, 1933, replied to that letter as follows:

"We acknowledge receipt of your letter of November 8, 1933 in which, in reply to ours of November 6 asking you to ship 50 gross pens on our order, you advise that you can not ship these pens due to increase in price on gold.

"Our order of May 1, 1933 accepted by you constitutes a definite contract for the delivery of 400 gross of fountain pens at the fixed price mentioned in the contract and is not made dependent on prices of gold. As a matter of fact, it was to guard against the possibility of increased prices that we gave you so large an order as explained in our letter of April 22, in which we also explained to you the manner in which we conduct our business and the loss that we would be subjected to if we could not obtain the merchandise at the price contracted.

"The matter you refer to that we talked over when you were in Chicago last relates to the question as to whether or not the increase in the price of gold releases you from your obligation under your contract. In this connection, I have

defendant should confer with the attorney in reference to the situation and if the attorney gave an opinion that the War and the federal control of gold did not enable Lamont to cancel the contract plaintiff would expand the labor and deliver the remaining portion of the pens. Some time later defendant sent the following letter to plaintiff, dated November 6, 1933:

"We have not yet received the fifty gross of pens which you were to have shipped us during the month of October. Will you please ship us the quickly as you can the fifty gross of men's pens and twenty gross of ladies."

"Please write us immediately so that we know how soon we can expect these pens."

It will be noted that defendant in that letter makes no mention of a conference with its attorney. To that letter Lain replied, vice president, on November 8, 1933, replied as follows:

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"We wish to advise you again that we cannot ship you these pens due to the increase in prices on gold. We are quite sure that we have called this matter over very clearly with you when last in Chicago, and you were supposed to advise us in this matter when you received your information."

"We can only quote you on these pens from day to day inasmuch as there is no set price on gold, and this varies from day to day." (Italics ours.)

Defendant, under date of December 14, 1933, replied to that letter as follows:

"We acknowledge receipt of your letter of November 8, 1933 in which, in reply to ours of November 6 asking you to ship 50 gross pens on our order, you advise that you can not ship pens due to increase in price on gold."

"Our order of May 1, 1933 accepted by you constituted a definite contract for the delivery of 400 gross of [illegible] pens at the fixed price mentioned in the contract. It is not [illegible] dependent on prices of gold. As a matter of fact, it was to guard against the possibility of increased prices that we gave you so large an order as explained in our letter of April 24, in which we also explained to you the manner in which we conduct our business and the loss that we would be put to if we could not obtain the merchandise at the price contracted."

"The matter you refer to that we talked over when you were in Chicago last relates to the question as to whether or not the increase in the price of gold releases you from your obligation under your contract. In this connection, I have

consulted with my attorneys and I have endeavored to obtain such other information as is available through business channels, and I am advised that the increase in the price of gold does not release you from your contract.

"Under the circumstances, I must regard your refusal to ship pens as a breach of contract on your part, and unless we receive shipment of the 50 gross requested within ten days, we shall take such steps to protect our interest under this contract as may be advised by our attorneys and shall hold you responsible for all damages incurred by reason of your breach of contract." (Italics ours.)

Upon receipt of that letter, notifying plaintiff, for the first time, of the result of defendant's conference with its attorneys, plaintiff, at once, had a conversation with defendant over the long distance telephone, in which it offered to deliver to defendant the remaining portion of the pens in accordance with the contract, and to confirm the conversation plaintiff, on November 17, 1933, wrote defendant as follows:

"Confirming our telephone conversation of above date, with reference to the balance of your order of pens, wish to advise that we have taken this matter up with our pen point manufacturer. He is willing to stand by and take a loss of $2000.00, and deliver the points due on your order of May 1st.

"As you stated in the conversation held with you today, you will advise us when to make shipment of these pens, and we are therefore waiting for instructions from you as per your letter of Nov. 14th giving us 10 days' time.

"I am sure you can consider this as good faith on the part of the pen point manufacturer as well as ourselves, in that he is willing to take this loss to satisfy your wants for this order.

"We are enclosing herewith statement of your account showing amounts past due, and upon receipt of check we shall ship quantity of pens as requested in your letter of Nov. 14th.

"Would appreciate hearing from you by return mail, and thanking you for past favors * * *." (Italics ours.)

Thereupon defendant refused to accept delivery of any more pens or to pay the balance due plaintiff, and claimed damages in the sum of $4,745.48, which was the difference between the contract price and the market price of pens, less plaintiff's credit for the $1,751.95.

Defendant, by its letter of November 14, 1933, continued

consulted with my attorneys and I have endeavored to obtain such other information as is available concerning further shipments, and I am advised that the increase in the price of gold does not release you from your contract.

"Under the circumstances, I [illegible] to ship pens on a basis of contract on your part, and unless we receive shipment of the [illegible] pens within ten days, we shall take such steps to protect our interest under this contract as may be advised by our attorney and shall hold you responsible for all damages incurred by reason of your breach of contract." (Italics ours.)

Upon receipt of that letter, notifying plaintiff, for the first time, of the result of defendant's compliance with its covenant, plaintiff, at once, had a conversation with defendant over the long distance telephone, in which it offered to deliver to defendant the remaining portion of the pens in accordance with the contract, and to confirm the conversation plaintiff, on October 1, 1933, wrote defendant as follows:

"Confirming our telephone conversation of [illegible] with reference to the balance of your order of pens, which we advise that we have taken this matter up with our pen joint manufacturer. He is willing to stand by and take a loss of $2000.00, and deliver the points due on your order of July 1st.

"As you stated in the conversation held with you today, you will advise us when to make shipment of these pens, and we are therefore waiting for instructions from you as per your letter of Nov. 14th giving us 10 days' time.

"I assume you can consider this as good faith on the part of the pen point manufacturer as well as ourselves, in that he is willing to take this loss to satisfy your order in full order.

"We are enclosing herewith statement of your account showing amounts past due, and upon receipt of check we shall ship quantity of pens as requested in your letter of July 1st.

"Would appreciate hearing from you by return mail, and thanking you for past favors [illegible]." (Italics ours.)

Thereupon defendant refused to accept delivery of the more pens or to pay the balance due plaintiff, and claimed damages in the sum of $4,745.45, which was the difference between the contract price and the market price of pens. Here plaintiff sues for the $1,751.95.

Defendant, by its letter of November 14, 1933, continued

the contract in force. Had plaintiff shipped the 50 gross of pens within ten days of November 14, it could not be contended that it had defaulted under the contract. Upon the receipt of defendant's letter plaintiff at once, by telephone and letter, offered to ship the 50 gross of pens upon receipt of a check for the balance past due. Defendant refused to accede to this reasonable and proper request of plaintiff. The contract involved installment deliveries and plaintiff had the legal right to insist that it receive payment for merchandise previously delivered before it made further shipments. Nor was that right taken away from it because it had permitted defendant to make partial payments or to delay in payments. The contention of plaintiff that the court erred in holding that it breached the contract is sustained.

Plaintiff strenuously contends that it would have had a right to refuse to deliver because of the fact that the federal government took control of the country's gold supply, arbitrarily fixed a price of $31 an ounce for that metal, by regulation limited the amount that could be handled or used by manufacturers, and required manufacturers to purchase from the federal government all gold used in their businesses. We do not deem it necessary to pass upon this contention, nor upon another contention that the evidence shows that defendant suffered no damage by reason of the alleged breach.

Defendant has filed in this court a motion to dismiss the appeal of plaintiff. After a consideration of the same we are satisfied that it should be denied.

The judgment of the Circuit court of Cook county is reversed, and judgment will be entered here in favor of plaintiff and against defendant in the sum of $1,751.95.

JUDGMENT REVERSED, AND JUDGMENT HERE IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN THE SUM OF $1,751.95.

Sullivan and Friend, JJ., concur.

the contract in force. [illegible] plaintiff's [illegible] or
pens within ten days of [illegible] it, [illegible]
that it had defaulted and [illegible] the contract. [illegible]
defendant's letter [illegible] by [illegible] letter,
offered to make one [illegible] means [illegible]
the balance past due. [illegible] to [illegible]
able and proper reduction of [illegible]
stablishment deliveries and [illegible] legal rights [illegible]
that it receive payment [illegible]
it made further shipments. [illegible]
because it had permitted [illegible] to [illegible] partial payments or to
delay in payments. The contention of [illegible] in holding that it breached the contract [illegible] sustained.

Plaintiff strenuously contends that it could have had
right to refuse to deliver because of the fact that the Canadian
government took control of the country's gold supply, effectively
fixed a price of $31 an ounce for that metal, by regulation limited
the amount that could be bought or used by manufacturers, and re-
quired manufacturers to purchase from the [illegible] government [illegible]
gold used in their business. We do not deem it necessary to
pass upon this contention, but from another consideration [illegible] evi-
dence shows that defendant authorized [illegible] by reason of the alleged
breach.

Defendant has filed in this court a motion to dismiss the
appeal of plaintiff. After a consideration of the [illegible] we are
satisfied that it should be denied.

The judgment of the Circuit court of Cook county is reversed,
and judgment will be entered here in favor of plaintiff and against
defendant in the sum of $1,731.80.

JUDGMENT REVERSED, AND JUDGMENT HERE IN FAVOR OF
PLAINTIFF AND AS FIRST [illegible] IN THE SUM OF $1,731.80.

Sullivan and Friend, JJ., concur.

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38463

ANTON BEDNER,
(Plaintiff) Defendant in Error,

v.

FRANK KAJER et al.,
Defendants.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

PAUL HOLUBEK and JULIA HOLUBEK,
(Defendants) Plaintiffs in Error.

285 I.A. 592

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a decree of foreclosure and certain other orders entered in a mechanic's lien case defendants Paul Holubek and Julia Holubek have sued out this writ of error.

On January 20, 1916, Anton Bedner, a subcontractor, filed a bill for mechanic's lien against Frank Kajer, the contractor, and Paul Holubek and Julia Holubek, the owners, as joint tenants, of the property in question, in which he alleged that there was due him under the terms of a contract between him and Kajer the sum of $572.95, and for extra work and material, $40, a total of $612.95. Rudolph Vacek, trustee under a certain trust deed, and the unknown owners of the notes secured by the trust deed were also made parties defendant. The bill prays for the allowance of a mechanic's lien and a foreclosure of the property.

For a proper understanding of plaintiffs in error's contentions, it is necessary to state fully the very unusual record before us. On February 18, 1916, the appearances of Paul Holubek and Julia Holubek were entered by their solicitor, Michael F. Girten,

38463

ARTON BLOMEN,
(Plaintiff) Appellant in error,

v.

FRANK KALNS et al.,
Defendants.

PAUL WOLBECK and JULIA WOLBECK,
(Defendants) Plaintiffs in error.

Mr. PRESIDING JUSTICE GORMAN DELIVERED THE OPINION OF THE COURT:

Upon a decree of foreclosure and certain other orders entered in a mechanic's lien case defendants Paul Wolbeck and Julia Wolbeck have sued out this writ of error.

On January 20, 1910, Oscar Sodini, a sub-contractor, filed a bill for mechanic's lien against Frank Kalns, the contractor, and Paul Wolbeck and Julia Wolbeck, the owners, in joint tenancy, of the property in question, in which he alleg[illegible] due him under the terms of a contract between [illegible] sum of $372.95, and for extra work and material [illegible] of $612.95. Theodore Vacek, trustee under a certain trust deed, and the unknown owners of the notes secured by the trust deed were also made parties defendant. The bill prays for the enforcement of a mechanic's lien and a foreclosure of the property.

For a proper understanding of plaintiffs in error's contentions, it is necessary to state full, the very unusual facts before us. On February 14, 1910, the appearances of Paul Wolbeck and Julia Wolbeck were entered by their solicitor, Michael S. Girton,

and on March 9, 1916, the latter filed their answer. On January 8, 1917, an order was entered referring the cause to Master in Chancery Ross. The master's certificate of evidence shows that at the hearing "Michael F. Girton, Esq., by Otto W. Jurgens, Esq.," appeared as "Solicitor for Paul Holubek and Julia Holubek." Master Ross commenced the taking of testimony on February 6, 1917, and completed it on June 2, 1919. The master found that complainant was entitled to a lien for $612.05, "from which should be deducted one-half of the sum of $407 paid by Paul Holubek to John L. Kolnick, which is $203.50, making $408.55; from which should be deducted the sum of $150 to be paid by Paul Holubek to William C. Zippman, doing business as Zippman Brothers. That the said Anton Bedner is entitled to a lien upon the premises of said Paul Holubek above described, for the sum of $258.55, together with interest at the legal rate, from on or about the 1st day of December 1915." The master recommended that the cost of the proceedings be divided equally between Paul Holubek and Anton Bedner. On July 2, 1919, Paul Holubek and Julia Holubek filed numerous objections to the master's report. Complainant also filed with the master numerous objections to the report, but they were not filed with the clerk of the court until October 8, 1928. On August 27, 1919, a stipulation was entered into "continuing and holding cause in abeyance without prejudice to either party until November 30, 1919, on account of complainant's soliciter going to California for his health." September 17, 1924, an order was entered transferring the cause "to the calendar of passed cases." On May 18, 1928, upon motion of complainant, leave was granted to file the master's report instanter; "that the objections raised before the Master stand as exceptions to said report. The stenographic record to be filed by complainant within five days." The order of May 18 bears the O.K. of "O. W. Jurgens Sol. for Def. Holubek." On

and on March 9, 1[illegible], the [illegible]
8, 1917, an order was [illegible]
Gimmonby house. The [illegible]
at the Hearing [illegible]
[illegible]," appeared as "[illegible]" and [illegible]
Master Noah commenced the hearing of [illegible] on January [illegible], 1917,
and completed it on June 4, 1917. [illegible]
was entitled to a lien [illegible]
one-half of the sum of $407 paid by [illegible] to Noah [illegible] Hinkle,
which is $203.50, making [illegible] should be [illegible] the
sum of $180 to be paid by [illegible] to [illegible], [illegible]
business in Uppsen Brothers. But [illegible] entitled
to a lien upon the premises of [illegible] above [illegible]
the sum of $208.50, together with [illegible]
on or about the last day of [illegible]."
that the cost of the proceedings [illegible]
Golubek and Noah Hinkle. [illegible]
Golubek filed mechanics and [illegible]
also filed with the master [illegible]
they were not filed with the clerk [illegible]
On August 27, 1918, a stipulation [illegible] "[illegible]" no
holding cause in abeyance [illegible]
November 3, 1918, on account of [illegible] to
California for his health. [illegible]
transferring the cause "[illegible]
1922, upon motion of complainant, [illegible]
master's report instanter; that [illegible]
Master stand as exceptions to [illegible]
to be filed by complainant within [illegible]
bears the O.K. of "O. W. Jurgens [illegible] Tom [illegible] Golubek." On

September 16, 1930, the solicitor for complainant presented to the court a verified petition which recites that Master in Chancery Ross had never signed the certificate of evidence, that he was no longer a master in chancery and that the court should enter an order upon him to sign the certificate of evidence, and thereupon, upon motion of solicitor for complainant, an order was entered ordering Ross to sign the certificate of evidence. On October 16, 1933, upon motion of solicitor for complainant, it was ordered that the hearing upon the objections to the report of the master be set for November 1, 1933. This motion appears to have been heard ex parte. On October 23, 1933, the following order was entered: "This cause being regularly called for trial and no one appearing to prosecute this cause in their behalf on motion of Court, it is ordered that this cause be and the same is hereby dismissed without costs for want of prosecution." On November 3, 1933, a notice addressed to "Anton Pecival, Sol. for Kajer; Joseph Kroupa, Sol. for Certain Dfts.; John O. Waters, Sol. for Cippman Bros., Otto W. Jurgens, Sol. for Holubeks," was drafted by complainant's solicitor. It stated that on Friday, November 3, 1933, complainant's solicitor "shall move the Court to approve and enter an order in substance sustaining the exceptions to the Master's Report and ordering a decree in accordance with such order." Attached to the notice is an affidavit by the solicitor stating "that he was unable to serve notice upon the defendants, Paul and Julia Holubek, because he is not acquainted with their present address; and that a notice mailed to their only known address was returned undelivered." A second affidavit by the same solicitor states "that he sent one James J. Francis to the last known office address of Otto W. Jurgens, solicitor for Paul and Julia Holubek, in the City Hall Square Building, Chicago, Illinois; * * * that said James J. Francis was unable to locate the said counsel; that said Francis made a

September 16, 1930, the solicitor for complainant presented to the court a verified petition which recites that Amazor in Chancery Does had never signed the certificate of evidence, that he was no longer a master in chancery and that the court should enter an order upon him to sign the certificate of evidence, and thereupon, upon motion of solicitor for complainant, an order was entered ordering Does to sign the certificate of evidence. On October 16, 1930, upon motion of solicitor for complainant, it was ordered that the hearing upon his objections to the report be set for November 1, 1930. This motion appears to have been heard "ex parte." On October 23, 1930, the following order was entered: "This cause being regularly called for trial and no one appearing to prosecute this cause in their behalf on motion of court, it is ordered that this cause be and the same is hereby dismissed without costs for want of prosecution." On November 3, 1930, a notice addressed to "Anton Poelvel, Sol. for Kofer; Joseph Krouge, Sol. for Martin Otte; John O. Walsre, Sol. for Clyman Bros., Etc., Jurgens, Sol. for Bolnbeim," was drafted by complainant's solicitor. It stated that on Friday, November 3, 1930, complainant's solicitor "shall move the Court to approve and enter an order in substance sustaining the exceptions to the master's report and ordering a decree in accordance with such order." Attached to the notice is an affidavit by the solicitor stating that he was unable to serve notice upon the defendants, Paul and Julia Bolnbek, because he is not acquainted with their present address and that a notice mailed to their only known address was returned unclaimed. A second affidavit by the same solicitor states "that he sent one James G. Francis to the last known office address of Etto C. Jurgens, solicitor for Paul and Julia Bolnbek, in the City Hall Square Building, Chicago, Illinois; * * * that said James G. Francis was unable to locate the said counsel; that said Francis made a

diligent search for said counsel; and that this affiant believes that Otto W. Jurgens is not in this state; and that he has no way of locating the said John O. Waters," solicitor for Zippman Brothers, defendants. An affidavit of Francis states that "he went to the last known address of Otto W. Jurgens, Solicitor for Paul and Julia Holubek, at the City Hall Square Building, Chicago, Illinois, * * * that after a diligent search for them, he was unable to locate either one; and that he was informed that Otto W. Jurgens is in Europe;" that he was also unable to locate Waters, solicitor for Zippman Brothers. The notice is not directed to Michael F. Girten, the solicitor of record for the Holubeks, and from the affidavits it appears that there was no effort made to serve him. On November 3, 1933, the trial court, upon motion of complainant's solicitor, heard ex parte, and without notice, so far as the record shows, entered an order sustaining complainant's objections to the master's report and finding that there was due complainant the full amount of the lien claimed, viz., $613.80. On November 13, 1933, the trial court entered a decree, which finds that there was due complainant from the Holubeks the sum of $1,154.36, with interest from the date of the decree; that on failure of the Holubeks to pay that amount with interest in sixty days the master in chancery shall make a sale of the premises. The decree was entered without service of notice upon the Holubeks, Girten or Jurgens. The certificate of evidence was not filed in the clerk's office until June 6, 1935, the delay being caused, apparently, by the failure of Ross to sign the certificate. On November 13, 1933, subsequent to the entry of the decree, and without notice to the Holubeks, Girten or Jurgens, the court, upon motion of the solicitor for complainant, entered an order setting aside the order of October 23, 1933, dismissing the cause for want of prosecution. On February 9, 1934, the Holubeks filed a verified petition in the cause, which states:

diligent search for mere commerce [illegible] believe that [illegible]. Jurgens is not in this state, [illegible] of locating the mail John [illegible], solicitor for [illegible] defendants. [illegible] of [illegible] last known address of [illegible], solicitor for [illegible] Holubek, [illegible] that after a diligent search [illegible] one; and that he was informed [illegible] be also unable to locate [illegible] solicitor [illegible]. The notice is not directed to [illegible] record for the Holubeks, and from the [illegible] there was no effort made to serve them. [illegible] trial court, upon motion of complainant's solicitor, [illegible] and without notice, so far as the record shows, entered an order [illegible] claiming complainant's objections to the master's report [illegible] that there was due consideration [illegible] vin., 161 Ill. App. 88. On November 16, 1931, the trial court [illegible] decree, which finds that [illegible] the sum of $1,154.38, with interest from [illegible] on failure of the Holubeks to pay that amount with interest in [illegible] days the master in chancery shall make a [illegible] minutes. The decree was entered without service of notice upon [illegible] Hitten or Jurgens. The certificate of [illegible] in the clerk's office until June 6, 1933, [illegible] by the failure of [illegible] independent to the entry of the decree and without notice to the Holubeks, Hitten or Jurgens, the court, upon motion of the solicitor for complainant, entered an order [illegible] October 23, 1933, dismissing the cause for want of prosecution. In February, 1934, the Holubeks filed a petition [illegible] in the cause, which states:

"* * * That on January 3, 1934, they were informed that a decree had been entered against them in the above entitled cause on November 13, 1933, and that this was the first information they had ever received of the entry of said decree; that upon examining the files and records in the above entitled cause on January 4, 1934, your petitioners discovered that said decree together with other orders had been entered herein, all without any notice to your petitioners or their solicitor; that your petitioners' solicitor, Otto W. Jurgens, has been absent from the jurisdiction of this court during all of the time during which said orders and said decree were entered.

"* * * That on October 23, 1933, an order was entered in the above entitled cause, dismissing said cause on the trial call for want of prosecution; that thereafter, towit: on November 13, 1933, without any notice to petitioners or their solicitor, the complainant caused to be entered an order setting aside said order of dismissal for want of prosecution and further finding that the Master in Chancery erred in his report in finding that the complainant in the above entitled cause was entitled to a mechanic's lien against petitioners' premises for the sum of $258.55, and further erred in finding that the costs of this proceeding should be equally divided between petitioners and the complainant, said order of November 3, 1933, further finding that complainant was entitled to a lien for $613.80; that thereafter on November 13, 1933, without notifying petitioners or their solicitor, the complainant through his solicitor caused to be entered in the above entitled cause a decree finding that there was due the complainant from petitioners the sum of $1,154.36 with 5% interest thereon from the time of the filing of the bill herein, and that petitioners should pay said sum with interest and all costs of this proceeding within sixty days from the date of the entry of said decree, which sixty days will expire on towit: January 12, 1934. Said decree also contained the usual provisions for sale by a Master in Chancery in default of such payment by petitioners of said sum.

"* * * That complainant's bill of complaint has been pending before your honors since 1916 and was stricken off so far as the above entitled cause is concerned from the dockets of this court pursuant to Rule 23 section 8 of this court prior to July, 1933; that complainant's solicitor had always prior thereto served notices of all motions in said cause on petitioners' solicitor or his representative, and that no notice of the presentation of said decree was ever served or came to the notice of petitioners or their solicitor until January 3, 1933.

"Your petitioner therefore represents unto your honors that said cause should be heard upon its merits and petitioners given full opportunity to present their defense; that the orders and decree entered in the above entitled cause since the month of October, 1933, are void and of no effect because no notice was served by complainant on petitioners of the presentation of any motions for the entry of said orders or said decree, and that the same should be therefore set aside and the hearing on the exceptions to the report of the Master in Chancery filed herein be set down for some day, so that petitioners receive a full hearing upon the merits. Wherefore petitioners pray that an order be entered herein setting aside said order of November 3 and said decree of November 13, 1933, and setting the exceptions to the Master's report down for hearing, and for such other orders as shall seem proper."

"* * * That on January 3, 1933, [illegible] a decree had been entered against them in the above entitled cause on November 11, 1932, and this was the first intimation they had ever received of the entry of [illegible] upon examining the files and records in the [illegible] on January 4, 1933, your petitioners discovered [illegible] together with other orders that had been entered herein, all without any notice to your petitioners or their solicitor, and your petitioners' solicitor, Wm. [illegible], has been [illegible] the jurisdiction of this court during all of the time [illegible] which said orders and [illegible] were entered.

"* * * That on October 6, [illegible], an order was entered in the above entitled cause, dismissing [illegible] for want of prosecution; that then [illegible], which on November 11, 1932, without any notice to petitioners or their solicitor, the complainant caused to be entered a [illegible] of dismissal for want of prosecution [illegible] Master in Chancery dated in [illegible] plaintiff in the above entitled [illegible] tion against petitioners' predecessor [illegible] further erred in finding that the costs of this proceeding should be equally divided between petitioners and the complainant, in the order of November 3, 1932, thereby finding that complainant was entitled to a lien for "$13.00; that Alexander on [illegible] 1932, without notifying petitioners or their solicitor, the complainant through his solicitor, [illegible] above entitled cause a decree finding [illegible] complainant from petitioners the sum [illegible] thereon from the time of the filing of the bill herein, and that petitioners should pay said sum with interest and all costs of this proceeding within sixty days from the date of the entry of said decree, which sixty days will expire on [illegible], 1932. Said decree was confirmed the same day [illegible] by a master in Chancery in [illegible] of said sum.

"* * * That complainant's [illegible] pending before your honors since [illegible] as the above entitled cause is concerned from the records of this court pursuant to Rule 32 section [illegible] 1933; that complainant's solicitor has failed to [illegible] served notices of all motions in [illegible] solicitor or his representative, [illegible] presentation of said decree was ever served on [illegible] of petitioners or their solicitor until [illegible].

"Your petitioner therefore respectfully prays your honors that said cause should be reset upon the docket [illegible] given full opportunity to present their evidence that the decree and decree entered in the above entitled cause since the month of October, 1932, are void and of no effect because no notice was served by complainant on petitioners or the proper notice of any motions for the entry of said orders or decrees, and that the same should be therefore set aside and [illegible] exceptions to the report of the Master in Chancery, that decree be set down for some day, so that petitioners may have a full hearing upon the merits. Therefore petitioners pray that an order be entered herein setting aside said orders of November 3 and said decree of November 11, 1932, and vacating the exceptions to the Master's report down for hearing, and for such other orders as shall seem proper."

In support of the petition, two affidavits were filed, one by Clinton A. Stafford, stating that he had been associated with Otto W. Jurgens, solicitor for certain defendants in the above entitled cause, for many years; that he occupied an office in the same suite with him, and has handled much of Jurgen's personal business as well as matters wherein he was solicitor; that said Jurgens has received his mail at 1110 City Hall Square Building, 139 North Clark Street, Chicago, Illinois, "where affiant has officed for more than one year last past;" that Jurgens was present in person in said office suite during a part of the summer of 1933, occupying an office therein at times; that affiant would have had authority to accept any notices of motion in the above entitled cause from the complainant or his solicitor for Jurgens, or would have directed and informed anyone seeking to serve same of the proper disposition of any such notice, but that affiant knows of no attempt having been made to serve any notice on Jurgens in the said cause "at any time in the past six months, although affiant has constantly officed at the above named suite," where mail has been delivered to Jurgens during said period; that affiant has received no notices of motions to said Jurgens in said cause, nor refused to accept any sought to be served on him. The name of said Otto W. Jurgens, affiant believes, has appeared as of said address in all legal directories. The other affidavit, made by Christian Hardt, states that he was employed as the law clerk for Otto W. Jurgens, solicitor of record for Paul Holubek and Julia Holubek, certain defendants in the above entitled cause, and has had his office at suite 1110 City Hall Square Building, 139 N. Clark Street, Chicago, "for more than one year last past;" that Jurgens, during said period, has received his mail at said office address and occupied an office in said suite of offices during a part of the summer of 1933; that affiant was authorized to accept service

In support of the petition, two affidavits are filed, one by Clinton A. Stanford, stating that he had been associated with Otto W. Jurgens, solicitor for certain defendants in the above entitled cause, for many years; that he occupied an office in the same suite with him, and was personal agent of Jurgens, transacting business as well as matters which he was solicitor, and said Jurgens has received his mail at 120 North Clark Street, Chicago, Illinois, "where Jurgens has occupied for more than one year last past." Other affidavit by Lawrence in said office suite during a part of the summer of 1932, stating in an office therein at times; that affiant was not authorized to accept any notices of motion in the above entitled cause for the complainant or his solicitor for Jurgens, or said Davis, but informed anyone seeking to serve some of the papers of petition of any such notice, and that affiant knows of no attempt having been made to serve any notice on Jurgens in the above entitled cause in the past six months, although affiant has personally occupied the above named suite," where mail has been delivered to Jurgens during said period; that affiant has received no notices of motions to said Jurgens in said cause, nor affiant is aware of any notice to be served on him. The name of said Otto W. Jurgens, affiant believes, has appeared as of said address in all legal directories, and other affidavit, made by Christian Hardt, states that he was employed as the law clerk for Otto W. Jurgens, solicitor of [illegible] Dunbar and Julia Hornsby, certain defendants in the above entitled cause, and has had his office at suite 1120 [illegible] Building, 120 W. Clark Street, Chicago, for more than one year last past; that Jurgens, during said period, has received his mail at said office address and occupied an office in said suite of offices during a part of the summer of 1932; that affiant was no longer employed

of any notices of motions in the above entitled cause for and on behalf of said Jurgens, and that affiant has heretofore seen the solicitor for complainant in the above entitled cause in the above named suite of offices, serving notices of motions in the above entitled cause, but that affiant has never seen him there "within the last six months" nor any representative of his, nor has affiant seen, received or been informed of any notices of motions of any kind in said cause during said period; that affiant has not refused service of any such notice of motion herein; that affiant believes that the names of Otto W. Jurgens and of Paul Holubek have appeared in all legal and telephone directories during said period as of said address. On February 19, 1934, the Holubeks filed a verified supplemental petition, in which they state that since the filing of their original petition they have discovered from the records of the court that their solicitor, Michael F. Girten, has never withdrawn of record as their solicitor; that Otto W. Jurgens was never formally substituted as petitioners' solicitor, nor has there been any order of this court allowing the withdrawal of said Girten as their solicitor or the substitution in his stead of said Jurgens; that said Girten has never been served by complainant with notices of motions made by complainant to set aside the order dismissing the said cause for want of prosecution; nor was he served with any notice of a motion to enter the decree; nor was he served with a notice of the further order that was entered in November, 1933, and that complainant did not serve notice of any motion on said Girten; that the certificate of evidence taken before Master in Chancery Ross, now on file in the cause, does not bear the signature of said master and therefore the decree and orders entered in the cause purporting to be based on the evidence contained in said transcript of evidence are void and of no effect, and that no decree could be entered in the cause until the master duly certified said transcript. The

of any notice of motions in the above entitled cause for and on behalf of said Burgess, and that affiant has notwithstanding the solicitor for complainant in the above entitled cause in the above named suits of affiant, serving notices of motions in the above entitled cause, but that affiant has never seen him since within the last six months, nor is he representative of his, nor has affiant seen, received or been informed of any notices of motions of any kind in said cause during said period; that affiant has not refused service of any such notice of motion personally; that affiant believes that the owner of Lot [illegible], Burgess and of Saul Weinbel have supported in all legal and judgment [illegible] motion, said service of said address. On February 1, 1934, the Defendants filed a verified supplemental petition, in which they state that after the filing of their original petition they have discovered from the records of the court that their solicitor, Albert [illegible] Ritter, has never filed of record as their solicitor; that Lot [illegible] Burgess was never formally substituted as petitioners' solicitor, nor was there been any order of this court allowing the withdrawal of [illegible] it either as their solicitor or the substitution in his stead of said Burgess; that said Ritter has never been served by complainant with notices of motions made by complainant to set aside the order dismissing said cause for want of prosecution; nor [illegible] served with [illegible] motion to enter the decree; nor was he served with a notice of the further order that was entered in November, 1931, and that complainant did not serve notice of any motion on a [illegible] that the certificate of evidence taken before Master in Chancery [illegible], now on file in the cause, does not bear the signature of said Master and therefore the decree and orders entered in the cause purporting to be based on the evidence contained in said transcript of evidence are void and of no effect, and that no decree could be entered in the cause until the Master duly certified said transcript. The

petitioners prayed "that they be given full opportunity to argue their exceptions on file herein to the report of the Master in Chancery; that the orders entered herein since the month of October, 1933, which are void and of no effect, be set aside, particularly the order of November 3, 1933, and the decree of November 13, 1933, and that after the certificate of evidence attached to the transcript of evidence taken before the Master be signed by said Master, the exceptions to said Master's report be set down for hearing." On February 19, 1934, on motion of complainant's solicitor, the court entered an order denying in toto the prayer of the Holubeks. Subsequently, upon motion of complainant, a master in chancery was appointed a special master to make a sale of the premises, and it appears that such sale was made and that the report of the special master as to the sale was approved.

Plaintiffs in error contend that under the record the decree entered in this cause, the order entered on November 3, 1933, and the order entered on November 13, 1933, setting aside the order dismissing the cause for want of prosecution, must be reversed. It is plain, from the record, that the contention of plaintiffs in error must be sustained. To hold otherwise would be to permit a miscarriage of justice.

The decree of the Circuit court of Cook county, the order of November 3, 1933, and the order of November 13, 1933, setting aside the order of October 23, 1933, dismissing the cause for want of prosecution, are reversed, and the cause is remanded with directions that if the trial court, after a hearing, enters an order vacating the order of October 23, 1933, it shall then pass upon all exceptions to the master's report, and shall thereafter enter further necessary orders not inconsistent with this opinion.

DECREE, ORDER OF NOVEMBER 3, 1933, AND ORDER OF NOVEMBER 13, 1933, SETTING ASIDE ORDER OF OCTOBER 23, 1933, DISMISSING THE CAUSE FOR WANT OF PROSECUTION, REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

petitioners [illegible] their accompanying [illegible] of the action in Chancery [illegible] 1955, [illegible] the panic of [illegible] the order of [illegible] 1955, [illegible] particularly and that other [illegible] of evidence [illegible] to the [illegible] exceptions to [illegible] February 15, [illegible] entered an order [illegible] quently, upon motion [illegible] ed a special [illegible] that such [illegible] as to the sale [illegible].

Liability [illegible] entered in this [illegible] order entered on October [illegible] the cause for [illegible] from the record, that [illegible] sustained. To hold otherwise would be [illegible] justice.

The decree of the [illegible] November 3, 1955, [illegible] the order of the order of October [illegible] 1955, [illegible] prosecution, [illegible] that if the trial court [illegible] the order of October [illegible] to the master [illegible] orders not inconsistent with this opinion.

[illegible]

[illegible] Sullivan and Triana, JJ., concur.

38506

FRANK B. ARATA,
Appellee,

vs.

FREMONT GORDON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 592[3]

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A judgment by confession on a lease, in the sum of $1,061, which included $126 attorney's fees, was entered in favor of plaintiff and against defendant. On motion of defendant, an order was entered that the judgment be opened and that leave be given to defendant to make defense, the judgment to stand as security. In a trial by the court there was a finding in favor of plaintiff and judgment was entered confirming the judgment by confession. Defendant appeals.

Defendant's affidavit of merits averred:

"(1) That said judgment was entered on an alleged claim for rent asserted to be due to plaintiff from the defendant for the months of July, August, September and October, 1934, and for attorney's fees, under a lease from plaintiff purporting to demise to defendant a portion of the premises known as 110 South Water Market, Chicago, Illinois, for a period commencing May 15, 1934 and ending April 30, 1935; that under date of June 12, 1925 plaintiff contracted to purchase said premises from Chicago Title and Trust Company as trustee under the Chicago Produce District Trust; at the time defendant entered into the lease with plaintiff upon which judgment was entered in this cause, plaintiff was in default under the terms of said contract with the owner of said property, (said Chicago Title and Trust Company, as trustee), and had been in default thereunder since January 22, 1932, which fact was unknown to defendant at said time.

"(2) That on March 5, 1934 pursuant to the provisions of said purchase contract under which plaintiff claimed the right to possession of said premises, a notice of plaintiff's defaults was sent by the vendor to plaintiff, and sixty days thereafter, plaintiff's right of possession to said premises was terminated pursuant to the provisions of said contract of purchase, and on June 21, 1934 a judgment for possession was entered by the Municipal Court of Chicago against both plaintiff and defendant and in favor of said vendor.

"(3) Defendant paid rent for said premises to plaintiff during the term of said lease through the month of June, 1934; by reason of the fact that plaintiff thereafter was not entitled to possession of said premises, and because possession was delivered

FRANK D. [illegible],

vs.

THEODORE [illegible],

MR. [illegible]

[illegible]

which included [illegible]

tiff had sued [illegible]

entered [illegible]

tendant [illegible]

trial by [illegible]

judgment [illegible]

tendant [illegible]

[illegible]

"(1) [illegible]

for rent [illegible]

months of [illegible]

torney's fees, under [illegible]

to defendant [illegible]

Market, Chicago, Illinois, [illegible]

and during April 3, 1937; [illegible]

plaintiff [illegible]

and Trust [illegible]

Trust; at the [illegible]

tiff upon [illegible]

was in default [illegible]

said property, [illegible]

and had been [illegible] 1933, [illegible]

fact was [illegible]

"(2) [illegible]

said premises [illegible]

possession of said premises, [illegible]

sent by [illegible]

tiff's [illegible]

to the premises [illegible]

1934 a judgment for possession [illegible]

of Chicago [illegible]

said vendor.

"(3) [illegible]

during the term of said lease [illegible]

reason of [illegible]

possession of [illegible]

to defendant thereafter by the vendor, defendant paid the monthly rent for said premises to said vendor for the month of July, 1934 and for the ensuing months of said term for which judgment was confessed in this cause.

"(4) By reason of the facts hereinabove set forth defendant states that he is not indebted to the plaintiff in the sum for which judgment was confessed against him, or in any sum."

The following "Agreed Statement of Facts" was filed in the cause:

"(1) On July 28, 1925, plaintiff entered into a unit sales contract with Chicago Title and Trust Company, as Trustee, the owner of the fee for

Lot 105 in South Water Market, Subdivision in the Northeast Quarter of Section 20, Township 39, Range 14, in the City of Chicago, County of Cook and State of Illinois, * * *

"(2) On July 25, 1932, plaintiff was in default under its unit sales contract * * * as follows:

Failure to pay the sum of $3,490 due under the terms of the contract to and including the payment due June 22, 1932;
Failure to pay general taxes for the years 1929 and 1930.

"On July 25, 1932, the Chicago Title and Trust Company, as Trustee, sent to plaintiff by registered mail a notice dated July 25, 1932, a copy of which notice marked for identification Defendant's Exhibit 2, may be admitted in evidence without further proof of its execution or contents. Said notice was received by the plaintiff on July 27, 1932.

"(3) On March 5, 1934, plaintiff was in default under the unit sales contract as follows:

Failure to pay monthly installments in the sum of $460 each, which became due January 22, 1932, and monthly thereafter;
Failure to pay semi-annual installments in the sum of $270 each, which became due February 22, 1932, and semi-annually thereafter.
Failure to re-pay the sum of $164.80 advanced by the Chicago Title and Trust Company, as Trustee, on account of insurance premiums;
Failure to pay general real estate taxes.

"On March 5, 1934, the Chicago Title and Trust Company, as Trustee, sent to the plaintiff by registered mail a notice dated March 5, 1934, stating that unless the plaintiff made good his defaults or surrendered possession within sixty days the Chicago Title and Trust Company, as vendor, would without further notice bring forcible detainer proceedings for possession, a copy of said notice marked for identification Defendant's Exhibit 3, may be admitted in evidence without further proof of its execution or contents. Said notice was received by the plaintiff on March 10, 1934.

to defendant [illegible] vendor [illegible] monthly
rent for said premises to said vendor [illegible] of July, 1924
and for the ensuing months of said term [illegible] was
contained in said [illegible].

"(2) [illegible] defendant states that he is not informed as to the [illegible]
for which judgment [illegible] defendant [illegible]."

The following "[illegible]" [illegible] in
the cause:

"(1) On July [illegible], 1925, [illegible] sales contract [illegible] the owner of the [illegible]

Lot 10 in [illegible]
Quarter of Section [illegible]
Chicago, County of [illegible]

"(2) On July 10, [illegible] under its
unit sales contract [illegible]:

Failure to pay [illegible] of the
contract to and including the payment due June [illegible], 1932;
Failure to pay [illegible] 1930.

"On July 26, 1932, the [illegible] Trustee, sent to plaintiff by registered mail a notice dated July 26, 1932, a copy of which notice [illegible] Exhibit 2, may be admitted in evidence [illegible] execution or contents. [illegible] on July 27, 1932.

"(3) On March 5, 1934, [illegible] unit sales contract as follows:

Failure to pay [illegible] which became due January 26, 1930, [illegible];
Failure to pay [illegible] each, which became due [illegible] thereafter.
Failure to [illegible] Title and Trust Company [illegible] premiums:
Failure [illegible] title [illegible].

"On March [illegible], 1934, [illegible] Trustee, sent to the plaintiff by registered mail a notice dated March 5, 1934, stating that unless the plaintiff made good his defaults or surrendered possession within sixty days the Chicago Title and Trust Company, as vendor, would [illegible] notice bring forcible detainer proceedings [illegible] said notice marked for identification Defendant's Exhibit [illegible], may be admitted in evidence without further proof of its [illegible] or contents. Said notice was received by the plaintiff on March 10, 1934.

"(4) On April 30, 1934, plaintiff entered into a lease with the defendant for a portion of the premises hereinbefore described. Said lease is part of the court records.

"(5) The defendant entered into possession of the premises described in the lease on to-wit: the date of execution of said lease and remained in possession of said premises until after October 31, 1934.

"(6) On May 16, 1934, * * * the vendor under the unit sales contract marked Defendant's Exhibit 1, instituted a suit in the Municipal Court of Chicago for forcible entry and detainer against plaintiff and defendant. On June 21, 1934, a judgment for possession in favor of said * * * Trust Company was entered in said forcible entry and detainer proceedings against plaintiff and defendant.

"(7) Plaintiff stipulates that defendant paid to the Chicago Title and Trust Company as Trustee, commencing on July 1, 1934, the sum of $233.75 per month for the months of July, August, September and October, 1934, for the use of that part of the property involved herein occupied by defendant * * *.

"(8) Thereafter, on July 19, 1934, said judgment for possession was vacated and set aside and said * * * Trust Company thereupon took a non-suit.

"(9) On July 28, 1934, Chicago Title and Trust Company, as Trustee, served on plaintiff a written demand for possession of the property described in the unit sales contract. Said notice was received by plaintiff on July 28, 1934. * * *

"(10) On July 28, 1934, Chicago Title and Trust Company, as Trustee, served a demand for possession of the property involved herein on the defendant * * *. Plaintiff admits the fact of the service of said notice. * * *

"(11) Thereafter, on August 1, 1934, said * * * Trust Company instituted proceedings in the Municipal Court of Chicago for forcible entry and detainer against plaintiff and defendant. In said * * * proceeding a judgment for possession was entered in favor of said * * * Trust Company against plaintiff and defendant on September 14, 1934. A writ of restitution was issued on said judgment against the plaintiff and executed upon him, and possession delivered to the * * * Trust Company thereunder.

"(12) The plaintiff did not voluntarily surrender possession of the premises involved herein to said * * * Trust Company until after the issuance of a writ of restitution following the judgment for possession against him.

"(13) Plaintiff's suit is for rent he claims to be due under the lease * * * for the months of July, August, September and October, 1934, at the rate of $233.75 per month, aggregating the sum of $935, together with the sum of $126 for attorney's fees provided in said lease. The defendant admits that he did not pay to plaintiff the rental herein described for the months set forth in this Paragraph."

There was also introduced in evidence the contract between the vendor, Chicago Title and Trust Company, as trustee under the

"(4) [illegible] with the [illegible] described, [illegible] covenants.

"(5) The defendant [illegible] described in the lease on [illegible] and remaining in possession of said premises [illegible] 1934.

"(6) On May [illegible], 1934, [illegible] sales contract [illegible] the Municipal Court of Chicago [illegible] against plaintiff [illegible] for possession in favor of said [illegible] in said forcible entry and [illegible] and defendant.

"(7) Plaintiff [illegible] Chicago title and Trust Company as Trustee, commencing on July [illegible], 1934, the sum of $[illegible] per month for the months of July, August, September and October, [illegible] property involved herein occupied by [illegible].

"(8) Thereafter, on July [illegible], 1934, said judgment for possession was vacated [illegible] thereupon took a [illegible].

"(9) On July [illegible], 1934, [illegible] an Trustee, served a [illegible] of the property described in the [illegible] notice was received by plaintiff on July [illegible], 1934.

"(10) On July [illegible], 1934, [illegible] Trustee, served a demand for possession of the property involved herein on the defendant [illegible] admits the fact of the service of said notice.

"(11) Thereafter, on August [illegible], 1934, [illegible] Company instituted proceedings in the Municipal Court of Chicago for forcible entry and [illegible] and demand. in said * * * proceeding a judgment for possession was entered in favor of said * * * [illegible] on September [illegible], 1934, [illegible] judgment against the plaintiff and [illegible] and possession delivered to the * * * [illegible].

"(12) The plaintiff [illegible] of the premises involved herein [illegible] after the issuance of a writ of [illegible] for possession against him.

"(13) Plaintiff's rent [illegible] the lease * * * for the months of July, August, September and October, 1934, at the rate of $[illegible] per month, aggregating the sum of $935, together with the sum of $[illegible] provided in said lease. The defendant [illegible] the rental herein mentioned or [illegible] aforesaid."

There was due [illegible] the vendor, [illegible] under the

Chicago Produce District Trust, and the vendee, plaintiff herein, by the terms of which the Trust Company sold to plaintiff the property in question; also the notice of default served on plaintiff on July 25, 1932; also the notice of default and notice that unless plaintiff made good his defaults within sixty days vendor would be entitled to terminate all of plaintiff's rights under the contract without further notice or demand and that unless plaintiff made good his defaults or surrendered possession within sixty days it would, without further notice, terminate all his rights under the contract and bring forcible detainer proceedings, served on plaintiff on March 5, 1934; also the demand for possession of the premises served on plaintiff on July 28, 1934.

It is not disputed that in defense of a suit for rent a tenant may show that his landlord's title is terminated. (See Mitzlaff v. Midland Lumber Co., 338 Ill. 575; Spafford v. Hedges, 231 Ill. 140; Corrigan v. City of Chicago, 144 Ill. 537.)

Defendant contends that plaintiff's interest in the premises terminated prior to the period for which rent is claimed, as the vendor had exercised its option to forfeit its contract because of plaintiff's defaults, prior to said period. The contract provides that after notice of default and the continuance thereof for a period of sixty days after such notice, the contract should become null and void and the rights of the purchaser should cease and determine at the option of the vendor. The sixty days' notice was given. The contract does not specify any particular method by which the vendor's option to terminate should be exercised, nor does it require any formal declaration of forfeiture. It is the law of this state that a forfeiture may be deduced from circumstances or a course of conduct that clearly evinces a definite intention to enforce such forfeiture. (Murray v. Schlosser, 44 Ill. 14, 16.) Notice to vendee that vendor will expect strict compliance with the contract followed by a failure

Chicago Produce Jobbing Co., [illegible] v. [illegible], [illegible] Ill. App. [illegible]). By the terms of which the [illegible] agreed to sell to plaintiff the property in question, plaintiff [illegible] on plaintiff on July 25, 1952; also the notice of default [illegible] that unless plaintiff made [illegible] within [illegible] days vendor would be entitled to terminate all of plaintiff's [illegible] contract without further notice or demand and [illegible] made good his default or [illegible] it would, without further notice, terminate the contract and bring forcible [illegible] served on plaintiff on March [illegible], 1954; also the [illegible] possession of the premises served on plaintiff [illegible].

It is not disputed that in [illegible] of [illegible] a tenant may show that his default [illegible] (Mitchell v. Midland [illegible], [illegible] Ill. App. [illegible]; [illegible] v. [illegible], 321 Ill. 140; Corriveau v. City of Chicago, [illegible] Ill. App.).

Defendant contends that [illegible] the interest in the premises terminated prior to the [illegible] of the [illegible] of time, as the vendor has exercised the option to forfeit [illegible] because of plaintiff's default, prior to said period. The contract provides that after notice of default and the certain [illegible] of for a period of sixty days after such notice, the contract [illegible] become null and void and the rights of the purchaser [illegible] and determine at the option of the vendor. The sixty day period [illegible] even. The contract does not specifically [illegible] which the vendor's option to terminate should be exercised, nor [illegible] requires any formal declaration of forfeiture. It is the law of this state that a forfeiture may be declared from circumstances or a course of conduct that clearly evinces a definite intention to enforce such forfeiture. (Murray v. "Odyssey", 44 Ill. App. [illegible]) Notice to vendee that vendor will expect strict compliance with the contract followed by a failure

of vendee to comply for a considerable period of time, held to be a sufficient notice of an election to terminate the contract in case of failure to pay. (Stuckrath v. Briggs & Turivas, 329 Ill. 555, 566.) Service of demand for possession held sufficient evidence of an election to forfeit. (Thiry v. Edson, 129 Ill. App. 128. See also In re Tracy, 80 Fed. (2d) 9.) The commencement of a forcible detainer suit is a sufficient declaration of forfeiture of a lease. (See Clark v. Stevens, 221 Ill. App. 233, 239; also Carlson v. Levinson, 228 Ill. App. 104.) In the instant case there is the additional fact that the vendor took a judgment for possession on June 21, 1934, and that it accepted rent for the premises from defendant. Payment of rent raises the presumption of tenancy. (35 C. J. 959, Sec. 22.) From the facts in the case and the law bearing upon them, it would seem clear that the vendor exercised its option to terminate the contract.

But plaintiff contends that if there was a forfeiture, the vendor was not entitled to rent from plaintiff's lessee until possession was surrendered to the vendor by the lessee, that defendant never made such surrender, and the payment of rent by him to the vendor was a voluntary payment and not an attornment under pressure or threats of expulsion; that defendant "took it upon himself to prejudge his rights and his duties and if he came to an unwarranted conclusion that his lessor's title was terminated he should not be excused from paying rent to his lessor." Plaintiff concedes there are cases that hold that a tenant under pressure of a possessory writ or threats of expulsion may attorn to a paramount title.

"The eviction may arise by ouster of the tenant by physical acts of the holder of the paramount title, or by virtue of legal proceedings instituted by him, or by the tenant's yielding possession to him, or by an attornment to him by the tenant while remaining in possession. * * * Actual ouster of the tenant is not necessary. If the tenant, to prevent being actually expelled from the demised premises, yields possession thereof, and attorns in good faith to one who has a title paramount to that of the landlord and also the

of vendee to complain [illegible] be sufficient notice [illegible] in case of failure to [illegible] III, 386, 388. [illegible] evidence of [illegible] 180. See also in re [illegible] a forcible detainer suit [illegible] of a lease. (See Lack v. [illegible] Darlington v. Levinson, [illegible] is the addition [illegible] on June 22, 1922, [illegible] defendant. [illegible] C. J. 929, Sec. 324.) [illegible] upon them, it would [illegible] to terminate the contract.

But plaintiff contends [illegible] vendor was not entitled to [illegible] was surrendered to [illegible] such surrender, [illegible] voluntary [illegible] exculpation; that [illegible] and his duties and [illegible] lessor's still [illegible] rent to his lessee." [illegible] that a tenant [illegible] pulsion may attorn [illegible]

"The eviction may arise by [illegible] acts of the holder of the paramount [illegible] proceedings instituted by him, or by virtue of legal [illegible] to him, or by an attornment to him by the [illegible] possession.

* * * Actual eviction of the tenant is not necessary, if the tenant, to prevent being [illegible] premises, yields possession to [illegible] one who has a title paramount [illegible]

right to immediate possession, this is equivalent to an actual ouster. * * * (Itals. ours.)

"Attornment. It is not necessary that the tenant should be actually and physically removed from, or should leave, the demised premises, for, in the absence of fraud or collusion on his part, he is evicted where he attorns to the holder of the paramount title or takes a new lease from him under pressure of a possessory writ or threats of expulsion." (36 C. J. 272-3.)

"According to the better view where a lessee, to prevent being actually expelled from the demised premises, yields the possession thereof and attorns, in good faith, to one having a paramount title to his lessor, and a right to immediate possession, it is equivalent to an actual ouster. In such a case the tenant cannot lawfully hold against the title of such party, and he is not bound to hold unlawfully, and subject himself to an action, and is not, therefore, compellable to resist such entry." (16 R. C. L. 655.)

"It is well settled that a tenant may surrender possession to the owner of the paramount title, entitled to the immediate possession, and claim an eviction, without waiting to be actually evicted by judicial proceedings; he is not bound to defend against a title which he knows must ultimately prevail. It is also the well settled rule that no recovery of rent can be had where the tenant, in good faith, has attorned to a stranger entitled to the immediate possession of the premises, this being equivalent to a complete ouster or eviction." (16 R. C. L. 950. Italics ours. See also Montanye v. Wallahan, 84 Ill. 355, 358 & 359; Gray v. Whitla, 174 Pac. 239, 240.)

As defendant argues, "The facts and circumstances attending Gordon's attornment to the paramount title-holder should not only legally, but equitably excuse any liability to plaintiff." On April 30, 1934, when the lease was executed, plaintiff had been in default for over two years, and at that time the total defaults approximated $14,000. On March 5, 1934, notice had been served on plaintiff by the holder of the paramount title demanding possession of the premises from plaintiff unless the latter made good the defaults within sixty days, as provided in the contract. Defendant was to receive possession of the premises on May 15, 1934, and on that date the period given plaintiff to make good his defaults had expired without any payment by him. The following day suit was instituted against plaintiff and defendant by the holder of the paramount title, and on June 21, 1934, a judgment for possession was entered against both defendants. While the judgment was in

right to immediate possession, [illegible]
owner, [illegible]

"Accordingly, [illegible]
be actually and peaceably [illegible]
demised premises, [illegible]
his part, he is entitled [illegible]
paramount title [illegible]
a possessory writ [illegible]

"According to the [illegible]
being entirely [illegible]
possession thereof [illegible]
paramount title [illegible]
it is equivalent to an [illegible]
cannot lawfully [illegible]
not bound to [illegible]
and is not, therefore, [illegible]
R. C. L. 883.)

"It is well [illegible] that a tenant [illegible]
to the owner of the paramount title, [illegible]
possession, and claim on [illegible]
evicted by judicial proceedings [illegible]
a title which is [illegible]
well established [illegible]
tenant, in good faith, [illegible]
immediate possession [illegible]
complete owner of [illegible]
See also Montague v. [illegible]
White, 174 [illegible]

[illegible] a determination [illegible]

Gordon's statement to [illegible]

Legally, the equitable [illegible]

April 3, 1944, when [illegible]

in de [illegible]

approximately [illegible]

plaintiff by [illegible]

of the premises [illegible]

faults within [illegible]

was to receive possession [illegible]

that date the [illegible]

had expired without any payment [illegible]

was instituted against [illegible]

the paramount title, and [illegible]

was entered against [illegible]

effect, defendant attorned to the holder of the paramount title and paid the rent for the month of July. On July 19, 1934, the judgment for possession was vacated and the vendor took a nonsuit. But on July 28, 1934, before the August installment of rent fell due, a demand for immediate possession was served on both plaintiff and defendant, and on August 1, 1934, the vendor commenced forcible entry and detainer proceedings against plaintiff and defendant and obtained a judgment for possession against both on September 14, 1934. A writ of restitution issued against plaintiff and possession was delivered to the vendor thereunder. Defendant attorned to the vendor for the rent for the months of July, August, September and October, 1934, at the rate of $233.75 per month, and it is for the rent of these four months that plaintiff sues. That defendant acted honestly in the premises cannot be questioned. He did not attorn to the vendor until a judgment for possession had been entered against him, and it is plain that he made the four payments to avoid eviction from his place of business. In the recent case of Sokolow v. Meyer, 248 N. Y. S. 405, where the facts in favor of the tenant were not so strong as are found in the instant case, the tenant's payment of rent to the holder of the paramount title was justified. After an exhaustive opinion the court stated that it would be inequitable to hold that the undertenant would have to submit to actual ouster and be relegated to his action for damages against the lessor, perhaps insolvent; that an undertenant, in a position where he would have his choice of either paying the rent due to the owner of the fee in order to protect his possession, or of giving up possession, or submitting to dispossession, and then seek to hold his lessor responsible in damages, so long as he acted in good faith his payment of the rent to the owner of the fee is a valid defense; that "to hold otherwise would be to violate the most ordinary principles of justice and common sense."

effect, defendant [illegible]
and paid the [illegible]
judgment for possession [illegible]
But on July 25, 1[illegible]
due, a demand for [illegible]
and defendants, [illegible]
entry and detainer [illegible]
and
ed a judgment for possession [illegible]
writ of restitution [illegible]
livered to the [illegible]
for the rent for the month of July, [illegible]
1924, at the rate of $[illegible] per month, [illegible]
these four months that plaintiff [illegible]
in the premises cannot be [illegible]
until a judgment for possession [illegible]
is plain that no [illegible]
place of business. In [illegible] Sokolov [illegible]
S. 405, where the facts in [illegible] of the tenant [illegible]
are found in the instant [illegible] the tenant's [illegible]
holder of the paramount title [illegible]
opinion the court stated that [illegible]
the understanding would [illegible]
gated to his action for damages against [illegible]
that an understanding, in a [illegible]
either paying the rent due [illegible]
his possession, or of [illegible]
possession, and then [illegible]
so long as he acted in good faith [illegible]
owner of the fee in [illegible]
be to violate the [illegible]
means."

Plaintiff raises another contention, which, if we understand it correctly, is as follows: If the vendor sued him under sec. 1, par. Third, of the Landlord and Tenant act, he would have the right to set off against any rent claimed by the vendor all payments made by him on his contract; that the amounts paid by plaintiff under the contract would exceed any amount that the vendor might claim for rent, and that "hence, if there is no liability on the part of the plaintiff to pay rent then there can be no liability on the part of the defendant to pay rent to the vendor." It is a sufficient answer to this rather strained contention to say that it was not raised or asserted in the trial court, and therefore cannot be urged here. However, paragraph Third of section 1 of the Landlord and Tenant act applies only to a suit where the owner of lands sues, for rent, a purchaser in possession who has failed to complete the purchase and the possession is terminated by forfeiture or noncompliance with the agreement, and possession is wrongfully refused or neglected to be given upon demand made in writing by the party entitled thereto. It has no application to the instant case. Whether plaintiff's interpretation of paragraph Third, sec. 1, is correct, or not, need not be considered.

The judgment of the Municipal court of Chicago is reversed and judgment will be entered here in favor of defendant for costs.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF DEFENDANT FOR COSTS.

Sullivan and Friend, JJ., concur.

[illegible]

stand it correctly, [illegible] under-
see, pay, [illegible] of the [illegible]
the [illegible]
payment [illegible]
plaintiff [illegible]
vendor might [illegible]
bility on [illegible]
no liability [illegible]
It is a multifarious [illegible]
that it was [illegible]
cannot be [illegible]
landlord and tenant [illegible]
lands sues, for rent, [illegible]
complete the purchase [illegible]
or noncompliance with [illegible]
refused or neglected to [illegible]
party until [illegible]
Whether [illegible]
correct, or not, need not [illegible]

The judgment [illegible]
and judgment [illegible]

[illegible]

Sullivan and Triand, [illegible].

38528

SELMA CONN,
Appellee,

v.

CHICAGO MUSICIANS' CLUB,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

285 I.A. 592

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In this action in contract, tried by the court without a jury, the issues were found for plaintiff and her damages were assessed in the sum of $1,000. Defendant appeals from a judgment entered upon the finding.

Plaintiff's verified statement of claim alleges that plaintiff is the sister of Hugo Conn, deceased; that he was a member in good standing of defendant; that he paid dues as required by its constitution and bylaws "and was fully paid up at the time of his death;" that defendant's constitution and bylaws provided that upon the death of an active member the sum of $1,000 "shall be donated to the family of the deceased member;" that Hugo Conn died on April 7, 1932, while he was a member in good standing, and that defendant was thereupon obligated to pay plaintiff the sum of $1,000, but that it wrongfully refuses to do so.

Defendant's affidavit of merits denies that Conn was a member in good standing; denies that he paid dues as required by defendant's constitution and bylaws and denies that he was fully paid up at the time of his death; states that on the date of his death and long prior thereto there were in full force and effect certain bylaws of defendant setting forth and defining the re-

38528

SELMA COHN,
Appellee,

v.

CHICAGO MUTUAL [illegible]
a corporation,
Appellant.

MR. PRESIDING JUSTICE [illegible]

In this action in [illegible], [illegible] a jury, the issues [illegible] assessed in the [illegible] entered upon the finding.

Liability [illegible] plaintiff is the [illegible] in good standing [illegible] its constitution and bylaws "[illegible] death;" that defendant's [illegible] the death of an active member [illegible] to the family of the deceased [illegible] 7, 1932, while he was a member [illegible] was thereupon obligated to pay [illegible] it wrongfully refused to do so.

Defendant's [illegible]

member in good standing [illegible] defendant's constitution [illegible] paid up at the time [illegible] death and long prior thereto [illegible] certain bylaws of [illegible] the re-

quirements, duties, rights, privileges and benefits of members of the organization; that sections 14 and 16 of said bylaws are as follows:

"Sec. 14. Dues. (a) Members must pay their dues in advance and obtain receipt for the same. The dues become due and payable, quarterly, on the first day of January, April, July and October. If not paid for current quarter before the first day of March, June, September and December, respectively, they shall automatically stand suspended from all rights, privileges and benefits, and if not paid on or before the last day of each quarter, they shall be erased from membership. 'A MEMBER WHO STANDS SUSPENDED IS NOT IN GOOD STANDING AND ALSO HIS FAMILY LOSES THE RIGHT TO THE DEATH DONATION PROVIDED FOR IN SECTION 16, IN THE EVENT HE DIES WITHIN NINETY DAYS OF HIS REINSTATEMENT.' * * *"

"Sec. 16. Death Donations. (a) On and after April 1st, 1925, upon the death of an active member, except as hereinafter provided for, who at the time of his or her decease, held full membership in the Chicago Musicians' Club for at least six consecutive months immediately prior to his or her decease, the sum of One Thousand ($1,000.00) Dollars shall be donated to the named beneficiary or beneficiaries or the immediate family of the deceased member, as the case may be, according to the provisions contained in this section of the by-laws; provided, however, that the said donation shall not be paid unless the deceased member HAS BEEN IN GOOD STANDING FOR AT LEAST NINETY (90) CONSECUTIVE DAYS IMMEDIATELY PRECEDING HIS OR HER DEATH. * * *"

The affidavit of merits further states, inter alia, that the deceased did not comply with the terms, conditions, requirements and conditions of the constitution and bylaws of defendant; that under section 14 "the dues for the quarter consisting of January, February and March, 1932, became due and payable on the first day of January, 1932, and must have been paid before the first day of March, 1932, to prevent suspension;" that deceased did not pay his dues for the said quarter until March 5, 1932, and that by reason of his failure to pay his dues before March 1, 1932, he automatically stood suspended from all rights, privileges and benefits; that on April 7, 1932, the date of his death, he had not been a member in good standing for ninety consecutive days, as required by section 14, and, therefore, his family and plaintiff lost the right to the "death donation," and plaintiff is not entitled to recover.

quirements, duties, rights, privileges [illegible] of members of the organization; that sections 1 and 2 of Article [illegible] are as follows:

"Sec. 1A. Dues. (a) Members [illegible] shall pay their dues in advance and obtain receipt for the same. The dues become due and payable, quarterly, on the first day of January, April, July and October. If not paid for current quarter before the first day of March, June, September and December, respectively, they shall automatically stand suspended from all rights, privileges and benefits, and if not paid on or before the last day of each quarter, they shall be stricken from membership. A MEMBER WHO STANDS SUSPENDED IN NOT IN GOOD STANDING AND HIS FAMILY LOSES THE RIGHT TO THE DONATION PROVIDED IN SECTION 1E, IN THE EVENT HE DIES DURING THE DAYS OF HIS SUSPENSION.' * * *"

"Sec. 1E. Death Donations. (a) On and after April 1st, 1925, upon the death of an active member, except as hereinafter provided for, who at the time of his or her decease, held full membership in the Ohio Musicians' Club for at least six consecutive months immediately prior to his or her decease, the sum of One Thousand ($1,000.00) Dollars shall be donated to the named beneficiary or beneficiaries or the immediate family of the deceased member, as the case may be, according to the provisions contained in this section of the by-laws; provided, however, that the said donation shall not be paid unless the deceased member HAS BEEN IN GOOD STANDING FOR THE NINETY (90) CONSECUTIVE DAYS IMMEDIATELY PRIOR TO HIS DEATH. * * *"

The affidavit of merits further states, inter alia, that the deceased did not comply with the terms, conditions, requirements and conditions of the constitution and bylaws of defendant; that under section 1A "the dues for the quarter consisting of January, February and March, 1932, became due and payable on the first day of January, 1932, and must have been paid before the first day of March, 1932, to prevent suspension;" that deceased did not pay his dues for the said quarter until March 7, 1932, and that by reason of his failure to pay his dues before March 1, 1932, he automatically stood suspended from all rights, privileges and benefits; that on April 7, 1932, the date of his death, he had not been a member in good standing for ninety consecutive days, as required by section 1A, and, therefore, his family and plaintiff lost the right to the "death donation," and plaintiff is not entitled to recover.

The case was tried upon written stipulated facts and certain oral and documentary evidence. The written stipulated facts are as follows:

"1. That on December 31, 1931, and for a continuous period since the year 1908, Hugo Conn was a member of the defendant, Chicago Musicians' Club, a corporation, and that prior thereto he was a member of the Chicago Federation of Musicians continuously since March 15, 1899.

"2. That on January 1st, 1932, there became due and payable from Hugo Conn to the said Chicago Musicians' Club, quarterly dues for the quarter including January, February and March 1932; that the said quarterly dues for the period of January, February and March, 1932, were not paid to the defendant, Chicago Musicians' Club, until March 5, 1932; that the quarterly dues covering the period of April, May and June 1932, due and payable on April 1st, 1932, were paid by the said Hugo Conn to the defendant, Chicago Musicians' Club, on the due date thereof, to-wit: April 1st, 1932, and accepted by the said defendant, Chicago Musicians' Club; that thereafter, on, to-wit: April 7, A. D. 1932, the said Hugo Conn departed this life.

"3. That the plaintiff, Selma Conn, was and is the sister of the said deceased, Hugo Conn, and if any death donation is payable by the defendant by virtue of the death of said Hugo Conn, the said plaintiff, Selma Conn, is rightfully entitled thereto."

Defendant contends "that the failure to pay dues before the first day of the third month of the quarter for which they are due, automatically suspends a member, and that failure to pay before the last day of the third month of the quarter for which they are due, results in loss of membership; that a member who stands suspended for non-payment of dues may reinstate himself in good standing (except for the purpose of payment of the death donation) by paying his dues before the last day of the third month of the quarter for which they are due; that upon such payment being so made, such member will become eligible to have the death donation paid in case his death occurs more than ninety days after such payment;" that under the undisputed facts in the case the finding and judgment of the trial court are against the evidence and contrary to the law.

Plaintiff, in the trial court, contended that defendant

The case was tried upon written stipulation and certain oral and documentary evidence. The written stipulated facts are as follows:

"1. That on December 31, 1931, and for a continuous period since the year 1908, Hugo Conn was a member of the defendant, Chicago Musicians' Club, a corporation, and that prior thereto he was a member of the Chicago Local Union of Musicians continuously since March 15, 1899.

"2. That on January 1st, 1932, there became due and payable from Hugo Conn to the said Chicago Musicians' Club, quarterly dues for the quarter including January, February and March 1932; that the said quarterly dues for the period of January, February and March, 1932, were not paid to the defendant, Chicago Musicians' Club, until March 1, 1932; that the quarterly dues covering the period of April, May and June 1932, due and payable on April 1st, 1932, were paid by the said Hugo Conn to the defendant, Chicago Musicians' Club, on the due date thereof, to-wit: April 1st, 1932, and accepted by the said defendant, Chicago Musicians' Club; that thereafter, on, to-wit: April 7, 1932, the said Hugo Conn departed this life.

"3. That the plaintiff, Selma Conn, was and is the sister of the said deceased, Hugo Conn, and if any death benefit is payable by the defendant by virtue of the death of said Hugo Conn, the said plaintiff, Selma Conn, is rightfully entitled thereto."

Defendant contends that the dues of the member were payable the first day of the calendar month of the quarter for which they are due, automatically suspend a member, and cause him to pay before the last day of the third month of the quarter for which they are due, results in loss of membership; that a member who stands suspended for non-payment of dues may rein state himself in good standing (except for the purpose of payment of the death donation) by paying his dues before the last day of the third month of the quarter for which they are due; that upon such payment being so made, such member will become eligible to have the death donation paid in case his death occurs more than ninety days after such payment; "that under the media utd facts in the case the finding and judgment of the trial court are against the evidence and contrary to the law.

Plaintiff, in the trial court, contended that defendant

had waived the requirements of sections 14 and 16 and was therefore estopped from claiming forfeiture. In support of her position plaintiff cited to the trial court Routa v. Royal League, 274 Ill. App. 152, recently decided by this division of the court. The trial court sustained plaintiff's contention and held that the Routa case governs the facts of the instant one. In its brief in this court plaintiff adhered to the position that it had taken in the trial court and all of its points in support of the judgment are based upon the assumption that defendant waived the requirements of sections 14 and 16. Defendant, in its reply brief, shows, from undisputed evidence, that it had at all times enforced the provisions of sections 14 and 16 and had never waived any of them; that while the deceased, on a number of occasions, was automatically suspended for failure to pay dues in accordance with section 14, it appears in each instance that the suspension was removed by the payment of decedent's dues before the last day of the respective quarter for which it was due, which was in strict compliance with the provisions of section 14. After a careful examination of the record we are forced to the conclusion that there is no question of waiver involved in the instant case. Indeed, upon the oral argument plaintiff's counsel was forced to abandon the waiver contention and to take a new position, viz., that sections 14 and 16 are ambiguous, and that therefore the provisions in the same, upon which defendant relies, should be disregarded. Because deceased was a member of defendant organization since 1908, it seems unfortunate that plaintiff should not be allowed to recover the death donation and we have therefore given this new contention serious consideration, but we are unable to find that there is any ambiguity as to the provisions in sections 14 and 16 upon which defendant relies. In addition to the fact that the deceased was bound to take notice of the constitution and bylaws of defendant, his membership card,

had waived the requirements of [illegible] the charge-
fare enjoined from claiming overtime. [illegible] of her position
plaintiff cited to the trial court [illegible] 74 Ill.
App. 152, recently decided by this [illegible] of the court. The trial
court sustained plaintiff's contention [illegible] the right case
governs the legal [illegible] in this court
plaintiff adhered to the position [illegible] trial
court and all of its opinions in support [illegible] based
upon the assumption that defendant waived the requirements of
sections 14 and 16. Defendant, in its trial brief, shows, from
undisputed evidence, that it had [illegible] the provi-
sions of sections 14 and 16 and had never waived any of these, that
while the discussed, on a month to month basis, was automatically
suspended for failure to pay dues in accordance with section 14.
It appears in each instance the suspension was removed by the
payment of defendant's dues [illegible] the
quarter for which it was due, [illegible] in accordance with
the provisions of section 14. [illegible] of the
record we are forced to the conclusion [illegible] question
of waiver involved in the last [illegible]
argument plaintiff [illegible]
tention and to take [illegible] 14
are ambiguous, and that [illegible] upon
which defendant relies, should be disregarded. [illegible]
was a member of defendant [illegible] seems inter-
timate that plaintiff should [illegible]
donation and we have [illegible]
consideration, but [illegible]
as to the provisions in sections 14 and 16 [illegible]
In addition to the fact that [illegible] take notice
of the constitution and bylaws of [illegible] association,

which he had to constantly carry, had upon its face the following, in capitals: "MEMBERS WHOSE DUES FOR CURRENT QUARTER ARE NOT PAID BEFORE THE FIRST DAY OF MARCH, JUNE, SEPT. AND DEC. STAND SUSPENDED," and upon the reverse side of the card appears, in capitals, the part of section 16 hereinbefore quoted. The provisions in sections 14 and 16 upon which defendant relies are also printed in the bylaws in capitals. In the instant case the payment by the deceased on March 5, 1932, of his dues for the first quarter of 1932 automatically reinstated him to good standing in the club, but as he died within the ninety-day period fixed by sections 14 and 16 his beneficiary was precluded from recovering the "DEATH DONATION PROVIDED FOR IN SECTION 16." While the provisions upon which defendant relies appear hard, especially in a case like the present one, where the deceased had paid his dues for a great many years, and where, but for his death within the ninety-day period the "death donation" would have been in force, nevertheless, the provisions in question are a part of the contract between defendant and the deceased, and we cannot change them.

The trial court erred in finding for plaintiff, and as there can be no recovery under the admitted facts of the case, the judgment of the Municipal court of Chicago is reversed and judgment will be entered here for the defendant for costs.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR DEFENDANT FOR COSTS.

Sullivan and Friend, JJ., concur.

which he had to [illegible] upon the follow-
ing, in capitals: "[illegible]
NOT [illegible] MO.
STAND SUPERVISED," and [illegible] appears,
in capitals, the [illegible] provisions in [illegible] are also printed in [illegible] case the payment of the [illegible] for the first six [illegible] standing in the [illegible] fixed by sections 14 and 16 [illegible] recovering the "[illegible]."
While the provisions upon which [illegible] especially in a case like the present one, where [illegible] had paid his dues for [illegible] death within the ninety-day period [illegible] have been in force, never thinking, [illegible] in question are a part of the contract between [illegible] and the d[illegible], and we cannot change them.

The trial court erred in [illegible], and as there can be no recovery [illegible] the judgment of the municipal [illegible] ment will be entered for the [illegible].

[illegible] FOR [illegible]

Sullivan and Friend, JJ., concur.

38567

AMERICAN TRUST & SAFE DEPOSIT COMPANY, as Trustee,
Plaintiff,

v.

SHERMAN GARAGE COMPANY et al.,
Defendants.

H. R. HALTERMAN et al.,
(Intervening Petitioners)
Appellants.

ROBERT BASS et al.,
(Intervening Petitioners)
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

285 I.A. 593

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying appellants' motion for leave to file their intervening petition and also from an order denying them leave to file an amended petition.

In 1928 three 99-year leases were entered into between the Bass estate, Bross estate and Thomson estate, respectively, as lessors, and George Brumlik, as lessee. Brumlik assigned the three leases to Sherman Garage Company, a corporation, in 1929. The three leases covered certain property in Chicago, upon which the lessee was to erect a ten-story garage building. The cost of the building was partly financed through a $500,000 leasehold bond issue secured by the building and leaseholds. In 1930, American Trust and Safe Deposit Company, as trustee under the trust deed securing the bond issue, filed its bill to foreclose the trust deed because of certain defaults in payment of interest,

38567

AMERICAN T U.T S [illegible]
COMPANY, as Trustee,
Petitioner,

v.

SHERMAN [illegible] et al.,
Respondents.

H. R. HARTMAN et al.,
(Intervening Petitioners)
Appellants,

ROBERT BAGG et al.,
(Intervening Petitioners)
Appellees.

MR. PRESIDING JUSTICE [illegible]

This is an appeal from an order [illegible] petitions for leave to file their intervening petitions [illegible] denying them leave to file an intervening petition.

In 1928 three 99-year leases [illegible] Bagg estate, from [illegible] lessors, and George [illegible], as lessee, [illegible] three leases to [illegible]. The three leases covered certain property, [illegible] the lessee was to erect [illegible] of the building was partly financed through [illegible] bond issue secured by the [illegible] American Trust and Safe Deposit Company, [illegible] under the trust deed securing the bond issue, [illegible] to foreclose the trust deed because of certain [illegible] in payment of interest,

and Chicago Title and Trust Company was appointed receiver of the premises. On July 8, 1931, a decree of foreclosure and sale was entered in the cause, and on March 7, 1934, Milo J. Tlusty was appointed successor receiver.

On December 22, 1934, parties representing the three lessors filed their intervening petition in the foreclosure proceedings, alleging certain defaults in taxes and ground rent, and asking that a decree be entered that the various leases were lawfully terminated and that they be set aside as clouds on the title of the lessors, etc. Sherman Garage Company; George Brumlik; American Trust and Safe Deposit Company, as trustee under the trust deed foreclosed; American National Bank and Trust Company of Chicago, successor trustee; Bondholders' Protective Committee, representing approximately ninety per cent of the bondholders, and ten non-depositing bondholders, were made defendants. The petition prayed that any bondholder who so desired might appear and defend. Of the ten non-depositing bondholders five were defaulted for failure to appear and the others were dismissed out of the proceedings. Answers were filed by American National Bank and Trust Company and by the Bondholders' Committee. The cause was referred to a master with directions to take proof and to report the same together with his findings of fact and recommendations. Able lawyers took part in the proceedings before the master.

The master found, inter alia, that on June 5, 1930, Chicago Title and Trust Company was appointed as receiver of the three leasehold estates and of all improvements, appurtenances and personal property, subject to the lien of the trust deed dated June 25, 1928; that said company resigned as receiver and Tlusty was appointed successor receiver. The master further found that the rent in the "Bass Lease" was fixed at $6,250 for the first year and three months;

and Chicago Title and Trust Company [illegible] of the premises. [illegible] was entered in the cause, [illegible] was appointed successor receiver.

On December [illegible] filed their intervening [illegible] alleging certain [illegible] a decree be entered [illegible] and that they be not held [illegible] etc. Sherman Savings Company [illegible] Safe Deposit Company, [illegible] American National Bank and Trust [illegible] trustee; Bondholders' Protective Committee, representing [illegible] nearly ninety per cent of the [illegible] bondholders, were made defendants. [illegible] bondholder who no depositing bondholders [illegible] the others were dismissed out of [illegible] by American National Bank [illegible] Committee. The cause [illegible] take proof and to report [illegible] and recommendations. [illegible] before the master.

The master found, inter alia, that on [illegible] Title and Trust Company [illegible] hold estates and of all improvements [illegible] property, subject to the lien [illegible] that said company [illegible] receiver. The master [illegible] "Base Lease" was filed [illegible]

$7,500 for the succeeding nine months; $10,000 for each of the next three years; $12,000 for each of the five years commencing February 1, 1933, and ending January 31, 1938; $14,000 for each of the five years commencing February 1, 1938, and ending January 31, 1943, and $16,000 for each of the remaining eighty-four years; that the rent was payable quarterly in advance; that the rent in the "Bross Lease" was fixed at $3,125 for the first year; $3,750 for the succeeding nine months; $5,000 for each of the next three years; $6,000 for each of the five years commencing February 1, 1933, and ending January 31, 1938; $7,000 for each of the five years commencing February 1, 1938, and ending January 31, 1943, and $8,000 for each of the remaining eighty-four years; that the rent was payable quarterly in advance; that the rent in the "Thomson Lease" was fixed at $5,000 for each of the first five years, $6,000 for each of the next five years, and $8,000 for each of the remaining eighty-nine years; that the rent was payable quarterly in advance; that each of the three leases provided that the lessee would pay all taxes and assessments, general and special, levied or assessed upon the premises or upon any buildings or improvements at any time situated thereon, or any levied or assessed upon the interest of the lessors in the lease during its term, all to be paid before they become delinquent and in any case in apt time to prevent any sale or forfeiture of the demised premises; that each of the leases provided that the lessee would construct a new building, not less than ten stories in height, on the premises, suitable for mercantile, office, garage or commercial purposes, etc.; that by a certain section in the Bass lease and also in the Bross lease it is provided that if default should at any time be made by the lessee or his assigns in the payment of the rent when due and such default should continue for thirty days after notice in writing thereof to the lessee, it should be

$7,500 for the succeeding nine months, [illegible] of the next three years; $[illegible] for each of the [illegible] years commencing February 1, 1932, and ending January 31, [illegible], [illegible] for each of the five years commencing January 31, 1943, and $15,000 for each of the remaining [illegible] years; that the rent as previously fixed [illegible] that the rent in the "Bruce house" was fixed at $[illegible] for the first year; $6,750 for the succeeding nine months; $[illegible] for each of the next three years; $6,000 for each of the five years commencing January 1, 1932, and ending January 31, 1938; $7,[illegible] for each of the five years commencing February 1, 1938, and ending January 31, 1943, and $8,[illegible] for each of the remaining [illegible] years; that the rent was payable quarterly in advance; that the rent in the "Brown house" was fixed at $5,000 for each of the first [illegible] years, $6,000 for each of the next five years, and $[illegible] for each of the remaining [illegible] nine years; that the rent was payable [illegible] in advance; that each of the three leases provided that the lessee should pay all taxes and assessments, general and special, levied or assessed upon the premises or upon any building or improvement [illegible] thereon, or any levied or assessed upon the interest of the lessor in the lease during its term, all [illegible] become delinquent and in any case in not less than [illegible] of the demised premises; that each of the leases provided that the lessee would construct a [illegible] in height, on the premises, suitable for manufacturing, office, storage or commercial purposes, etc.; that [illegible] in addition in the Bruce lease and also in the Brown lease it is provided that if a result should at any time be made by the lessee of [illegible] in the payment of the rent when due and a default should continue for thirty days after notice in writing thereof to the lessee, it should be

lawful for the lessor to declare the term ended, etc.; that the Thomson lease contains a similar section. The master further found that at the time the petition of the lessors was filed the lessee under the Bass lease had defaulted as follows: Installments of ground rent of $3,000 each, due November 1, 1933, February 1, 1934, May 1, 1934, and August 1, 1934, respectively, and that nothing has since been paid thereon; in payment of taxes as follows: A balance of $2,994.13 on the general real estate taxes for 1929; a balance of $501.86 for 1930; a balance of $1,277.28 for 1931, all with penalties and interest thereon, and a balance of $1,740.13, with penalties and interest thereon, of the first installment of the general real estate taxes for 1933; that the second installment of the general real estate taxes for 1933 is $2,720.52; that at the time of the filing of the petition the lessee under the Bross lease had defaulted as follows: $1,000 balance on an installment of ground rent of $1,500 due on August 1, 1933; installments of ground rent of $1,500 each, due on November 1, 1933, February 1, 1934, May 1, 1934, and August 1, 1934, respectively, upon which nothing has been paid; in payment of taxes as follows: A balance of $650.33 on the general real estate taxes for 1929; a balance of $1,092.02 on the 1930 taxes, and a balance of $779.05 of the first installment of the 1933 taxes, all with penalties and interest thereon; that the second installment of general real estate taxes for 1933 is $1,394.35. The master further found that by reason of the aforesaid defaults "a notice was prepared by said Robert P. Bass, et al., as trustees, and by John A. Bross, as lessors, dated August 29, 1934, pursuant to the provisions of said leases; that said notices were signed by said lessors and related to said defaults in rent and in the payment of taxes; that said notices were addressed to George Brumlik, Sherman Garage Company, Milo J. Tlusty, receiver, American Trust and Safe Deposit Company, trustee, and to All Whom It May Concern;"

lawful for the lessee to deduct [illegible] rent, but the Thomson lease contains a similar provision. [illegible] found that at the time the notices of [illegible] the lessee under the Bean lease had delinquent ground rentals of $[illegible], on each, due November 1, 1933, May 1, 1934, May 1, 1934, and August 1, 1934, respectively, and that nothing has since been paid thereon; in payment of the following: A balance of $2,994.13 on the general real estate taxes for 1932; a balance of $801.86 for 1933; a balance of $[illegible] on [illegible], all with penalties and interest thereon, and a balance of $[illegible], with penalties and interest thereon, on the first installment of the general real estate taxes for 1933; that the second installment of the general real estate taxes for 1933 in the [illegible] time of the filing of the petition the lessee [illegible] had defaulted as follows: $1,800 balance on [illegible] ground rent of $1,800 due on August 1, 1933; installment [illegible] rent of $1,800 each, due on November 1, 1933, [illegible] 1, 1934, May 1, 1934, and August 1, 1934, respectively, [illegible] been paid; in payment of [illegible] balance of [illegible] on the general real estate taxes for 1932; a balance of $[illegible] on the 1933 taxes, and a balance of $[illegible] of the first installment of the 1933 taxes, all with penalties and interest thereon; that the second installment of general real estate taxes for 1933 [illegible]. The master further found that by [illegible] notice was prepared by [illegible] and John A. Brown, as lessors, dated [illegible], pursuant to the provisions of said leases; that said notices were signed by said lessors and related to a [illegible] in the payment of taxes; that said notices were [illegible] Sherman Garage Company, Milo J. Tinsley, trustee, Marion Trust and Safe Deposit Company, trustee, [illegible] "All Whom It May Concern;"

that said notices were duly served upon each of the persons to whom they were addressed and were also duly served upon American National Bank and Trust Company, as successor trustee; that thereafter said defaults not having been made good within the period prescribed by the lease the lessors elected to declare and did declare the demised term ended. The master further found that at the time of the filing of the petition the lessee under the Thomson lease had defaulted as follows: Installments of ground rent of $1,500 each, due on January 1, 1934, April 1, 1934, July 1, 1934, and October 1, 1934, respectively, upon which nothing has been paid; in payment of taxes as follows: A balance of $711.89 on the general real estate taxes for 1929; a balance of $613.30 for 1930; a balance of $244.19 for 1931, all with penalties and interest thereon, and a balance of $870.11, together with penalties and interest thereon, of the first installment of the general real estate taxes for 1933; that the second installment of general real estate taxes for 1933 is $1,360.31. The master further found that by reason of the said defaults and pursuant to the provisions of the lease a notice was prepared and signed by New England Trust Company and Orrin G. Wood, trustees, as lessors; that the notice stated the defaults (heretofore referred to); that it was addressed to George Brumlik, Sherman Garage Company, M. J. Tlusty, receiver, American National Bank and Trust Company of Chicago, successor to American Trust and Safe Deposit Company, as Trustee, and was duly served on each of the persons to whom it was addressed and was also served on American Trust and Safe Deposit Company; that thereafter said defaults not having been made good within the period prescribed by the lease, the lessors elected to declare and did declare the demised term ended. The master further found that "neither said Sherman Garage Company nor George Brumlik, nor the receiver appointed by this Court, for said lease-

that said notices were duly served [illegible] to whom they were addressed and [illegible] National Bank and Trust Company, [illegible] after said defaults had having been [illegible] prescribed by the [illegible] declare the said [illegible] the time of the filing of the petition [illegible] leases had defaulted as follows: [illegible] $1,500 each, due on January 1, 19[illegible], [illegible] and October 1, 1924, respectively, [illegible] in payment of taxes as follows: [illegible] real estate taxes for 1923; a balance of [illegible] for 1924; a balance of $204.19 for 1921, [illegible] a balance of $277.11, [illegible] of the first installment of the [illegible] that the second installment of [illegible] for 1923 in $1,303.31. The master further found that [illegible] defaults and pursuant to the court [illegible] prepared and signed by the [illegible] trustees, as lessors, [illegible] fore referred to); that [illegible] Garage Company, M. J. Hurley, [illegible] Trust Company of Chicago, [illegible] Deposit Company, as trustee, [illegible] sons to whom it was addressed [illegible] and Safe Deposit Company; that the defaults had having been made good within the period [illegible] elected to declare and did declare [illegible] further found that "neither said Chicago Garage Company nor George Brumlik, nor the receiver appointed [illegible] said lease-

hold estates, nor the trustee * * *, nor the bondholders nor any of them, nor any of the other defendants to said intervening petition have tendered payment of any of the sums which are in default and no redemption has been made by any person from such default." The master further found that the intervening petitioners, as a group, had made the following offer in open court:

"1. To pay the sum of $40,000 into court or to the receiver of the court as the Court may direct to be distributed pursuant to the directions of the Court to and among those interested in the leasehold or to such of them as the Court shall find entitled thereto;

"2. To assume and agree to pay all unpaid and future accruing taxes, which in said leases the lessee covenanted to pay, and

"3. To release and waive all claims which they have against said lessee, Sherman Garage Company, and all persons holding under it or as successor to it,

"Provided, however,

"1. That, upon the making of such payment, the Court enter a decree which shall find that the term of each of said three leasehold estates has been properly terminated and that there is no further right, title or interest in and to said three parcels of land, or the building, or any part thereof in said George Brumlik or in said Sherman Garage Company as lessee or in any persons or corporations holding under him or it or as successor to either of them;

"2. That the said decree of this Court shall quiet the title of the said three lessors respectively in said land and building;

"3. That the said decree shall direct that all money in the hands of the receiver of this court, Milo J. Tlusty, less his expenses and proper fees as receiver, and less the sum of $2,400, which latter sum shall be in addition to the $40,000 offered and mentioned in Paragraph 1 above and shall be used for the same purposes as therein set forth, and all personal property in his possession as such receiver, including all office furniture, equipment and supplies, and all machinery, tools and other equipment used in the operation of the garage and repair shop, in said demised premises, and all merchandise on hand, including tires, gasoline and oil, and all bills and accounts receivable, be paid and delivered over to the said lessors as a group, and the said lessors shall assume all accounts payable of the said receiver in the operation of the garage business in the demised premises; and that such delivery and settlement by and with said receiver be made at the time of the decree."

The master estimated the expected net income from the premises at $48,600 annually, and that there should be available therefrom for past due indebtedness on ground rent, taxes and for dividends, the

hold estates, not the trustee [illegible], nor the [illegible] holding any of them, nor any of the other defendants [illegible] intervening petition have tendered payment or [illegible] default and no tender has been made by any [illegible] default." The [illegible] Court [illegible] petitioners, as a group, [illegible] the following offer in open court:

"1. To pay the sum of $[illegible] into court or to the receiver of the court as the Court may direct to be distributed pursuant to the direction of the Court to and among those interested in the Longhold or to such of them as the Court shall find entitled thereto;

"2. To assume and agree to pay all arrears of ground rents accruing taxes, which in said leases are [illegible] to pay, and

"3. To release and waive all claims which they have against said lessee, [illegible] holding under it or its successor to it,

"Provided, however,

"1. That, upon the making of such payment, the Court enter a decree which shall find that the term of [illegible] said three leaseholds estates has been properly terminated and that there is no further right, title or interest in the said three parcels of land, or the building, or any part thereof in said George Brumlik or in said Harvard Terrace Company or in any persons or corporations holding under him or it or as successor to either of them;

"2. That the said decree of [illegible] shall vest the title of the said three leaseholds [illegible] in the land and building;

"3. That the said decree shall direct that all money in the hands of the receiver of this court, [illegible], less his expenses and proper fees as receiver, [illegible] the sum of $2,400, which latter sum shall be in addition to the $40,000 offered and mentioned in paragraph 1 above, are shall be used for the same purposes as therein set forth, and all personal property in his possession as such receiver, including all office furniture, equipment and supplies, and all machinery, tools and other equipment used in the operation of the premises [illegible] said demised premises, and all miscellaneous on hand, including stores, gasoline and oil, and all other [illegible] property, be paid and delivered over to the [illegible] group, and the said lessors shall assume all accounts payable of the [illegible] in the operation of the premises [illegible] in the demised premises; and that such delivery and settlement [illegible] be made at the time of the decree."

The master estimated the expected net income from the premises at $48,000 annually, and that there should be available therefrom for past due indebtedness on ground rent, taxes and for dividends, the

sum of $13,600. The master further found:

"That there is past due on ground rent, approximately $40,000, which if amortized over a period of five years would reduce the net return to approximately $5,600.

"That a group of investors have submitted a proposal substantially embodying the following provisions:

"(a) That a new lease be granted to a new corporation substantially under the terms and provisions and for the unexpired period of the previous leases;

"(b) The investors to pay to the owners of the fee, the full amount of general taxes now past due, including general taxes for 1933, for which amount the investors will take six per cent preferred stock and approximately one-quarter of the common stock, the balance of the common stock to be issued to the holders of the bonds secured by the leasehold mortgage.

"That there being only approximately $5,600 available for dividends on preferred stock and on common stock, it would follow that there would be available to bondholders approximately $3,000 per year in view of the fact that the ground rent is increased by $5,000 in the year 1939; that unless there is a corresponding increase in income commencing with 1939 there would be nothing available thereafter for the holders of the bonds - at any rate, it would require in excess of ten years' time for the bondholders to realize out of dividends the amount which is now available as a result of the offer of the owners of the fee to pay the sum of $40,000 in cash as hereinbefore set forth."

The master further found that all of the material allegations in the intervening petition had been proven; that the equities were with the intervening petitioners, and he recommended:

"That a decree be entered herein in conformity with the prayer of said intervening petition;

"That the proposal of the intervening petitioners as set forth in this report be accepted;

"That the Court retain jurisdiction of this matter for the purpose of determining the distribution of the funds which will be available as a result of the proposal of the said intervening petitioners, among such of the parties as may be entitled thereto."

No objections were filed to the master's report. The decree found, inter alia, that the offer of settlement was "a reasonable and fair basis upon which a decree should be entered in this cause; that said sum of $40,000 should be paid to Milo J. Tlusty, as receiver, to be distributed by him according to the further order of this Court; * * * that Milo J. Tlusty pay and deliver to said intervening petitioners or their duly designated agent, all money in his hands less

sum of $40,000. The [illegible]

[illegible]
$40,000, which [illegible]
reduce the [illegible]

"That a group of [illegible]
substantially embodying the foregoing [illegible]

"(a) That a new issue be [illegible] for [illegible]
substantially under the terms [illegible]
measured period of the previous issues;

"(b) The investors so pay to the [illegible] of the [illegible],
the full amount of [illegible]
taxes for 1935, for which amount the investors [illegible]
cent preferred stock [illegible]
stock, the balance of the [illegible]
of the bonds assumed by [illegible]

"That [illegible]
for dividends on preferred stock [illegible]
follow that there [illegible]
nately $[illegible] per year in value of the [illegible]
is increased by $[illegible] in [illegible]
corresponding increase in income [illegible]
be nothing available [illegible]
at any rate, it would require in excess [illegible]
the bondholders to realize [illegible]
now available as a result of [illegible]
to pay the sum of $[illegible] [illegible]

The matter further [illegible]

intervening petition has been proven; [illegible]

the intervening petitioners, [illegible]

"That a decree be entered herein [illegible]
prayer of said intervening petitioners;

"That the proposal of the trustee [illegible]
forth in this report be accepted;

"That the court retain jurisdiction [illegible]
the purpose of determining [illegible]
will be available [illegible]
venting petitioners, [illegible]
thereto."

No objections were filed to the [illegible]

Inter alia, that the order of settlement [illegible]
basis upon which a receiver should be entered in this cause that said
sum of $40,000 should be paid to Milo [illegible], Trustee, to
be distributed by him according to the further order of this court;
* * * that Milo L. Finely pay and deliver to said intervening peti-
tioners or their duly designated agent, all money in his hands less

his expenses as receiver and less the said sum of $2,400 as aforesaid (to be paid for the expenses of the Bondholders' Committee) and shall also deliver to said agent all of the personal property in his possession as such receiver, including office furniture, equipment and supplies, and all machinery, tools and other equipment used in the operation of the garage and repair shop, in said demised premises, and all merchandise on hand, including tires, gasoline and oil, also all bills and accounts receivable, and that said intervening petitioners assume all accounts payable of the said receiver in the operation of the garage business in the demised premises, and assume all unpaid and future accruing taxes which, under said leases, are to be paid by the lessees and release the lessees and all those holding under them or as successor from all other liabilities." The decree confirmed the termination of the three leases, set aside and declared void the trust deed securing the $500,000 of leasehold bonds, confirmed the payment of $40,000 by the lessors to be distributed to the bondholders as the court should thereafter direct, and ordered that the property be turned over to the lessors by the receivers. The decree was entered May 29, 1935.

On June 18, 1935, a verified intervening petition was presented by appellants, "bondholders holding bonds on the trust deed foreclosed in this proceeding * * * most of your petitioners are depositing bondholders with the so-called Bondholders' Protective Committee." The petition prayed "that an order may be entered herein vacating and setting aside the decree of forfeiture heretofore entered herein and further that an order may be entered dismissing the intervening petition of said Lessors herein; that an order may be entered herein for a rule on the Trustee, its attorneys, said Chicago Title and Trust Company and said Dayton Keith and said so-called Bondholders' Protective Committee who have

his expenses as receiver and less the sum of [illegible] as afore-
said (to be paid for the expenses of the "conmonwealth" committee),
and shall also deliver to said agent [illegible]
in his possession as such receiver, including [illegible] furniture,
equipment and supplies, and all machinery, tools and other equip-
ment used in the operation of the [illegible]
demised premises, and all [illegible]
gasoline and oil, also all bills and accounts [illegible]
said intervening petitioner assume [illegible]
said receiver in the operation of [illegible] demised
premises, and assume all unpaid [illegible]
under said leases, are to be paid by the lessees and release the
lessees and all those holding under them [illegible] from all
other liabilities." The decree continued the [illegible] of the
three leases, set aside [illegible] void the [illegible] securing
the $500,000 of Consolidated bonds, continued the payment [illegible]
by the lessors to be distributed to [illegible]
should thereafter direct, and order [illegible] be turned
over to the lessors by the receiver. [illegible]
May 29, 1928.

On June 18, 1928, [illegible]
presented by appellants, [illegible]
deed foreclosed in this proceeding [illegible]
are depositing bondholders with the [illegible]
tective Committee." The petition prayed "that [illegible]
entered herein vacating and setting aside the decree of foreclosure
heretofore entered herein and further [illegible]
dismissing the intervening petition of [illegible]
an order may be entered herein for a rule on the [illegible]
attorneys, said Chicago title [illegible]
Keith and said so-called Consolidated [illegible]

appeared in this cause, to account for any and all moneys which they have received from the premises herein unlawfully and improperly and that your petitioners may have such other and further relief as Equity may require and to the Court shall seem meet." The petition is signed, "By Max Richmond Kargman Their attorney and duly authorized agent in this behalf," and the affidavit in support of the petition is also made by him. An order was entered denying the "motion of Max Richmond Kargman as attorney for a group of bondholders for leave to file an Intervening Petition." Thereafter, on June 20, 1935, a verified amended petition was presented to the court by appellants, "bondholders holding bonds secured by the trust deed foreclosed in this proceeding, * * * most of your petitioners are depositing bondholders with the so-called Bondholders' Protective Committee." This petition is signed, "By Max Richmond Kargman Their attorney and duly authorized agent in this behalf," and the affidavit in support of it was also signed by that attorney. On June 22, 1935, the court entered the following order:

"This cause coming on to be heard upon the motion of Max Richmond Kargman, attorney for H. R. Halterman and others, for leave to said H. R. Halterman and others to intervene herein, and to file their amended petition herein;

"And it appearing to the Court and the Court doth find:

"1. That due notice of said motion has been served upon all parties of record herein, and that a full hearing has been had with reference to the matter set forth in said amended petition before this Court, as hereinafter more fully set forth; that the Court has read said verified amended petition and has heard arguments of counsel;

"2. * * *

"3. That on December 20, 1934, an order was entered herein granting leave to Robert P. Bass, Sam Bass Warner and Harry C. Edmonds as trustees under the last will and testament and codicil thereto of Clara F. Bass, deceased; John A. Bross, individually, and New England Trust Company, a corporation, and Orrin G. Wood, as trustees under the last will and testament of Arthur C. Thomson, deceased, to file herein their intervening petition as owners of the fee title to the premises involved herein;

appeared in this cause, to wit: [illegible]
they have received from [illegible]
property and that [illegible]
relief as justice [illegible]
petition is signed, "[illegible]
duly authorized [illegible]
of the petition [illegible]
the "motion of [illegible]
holders for leave to file [illegible]
June 20, 1935, [illegible] verified amended [illegible] to the [illegible]
by appellants, "bondholders [illegible] bond [illegible] by the [illegible]
foreclosed in this proceeding, [illegible]
depositing bondholders [illegible]
Committee." This petition [illegible]
attorney and duly [illegible]
in support of it [illegible]
the court entered the following order:

"This cause coming on to be [illegible] motion of Mr. Richmond Hargrave, [illegible]
leave to said R. R. [illegible]
and to file their [illegible]

"And it appearing [illegible]

"1. That [illegible] upon all parties of record herein, [illegible] been had with reference to the [illegible] before this Court, as herein [illegible] Court has read and [illegible] ments of counsel;

"2. * * *

"3. That on [illegible] granting leave to object [illegible] Edmonds as trustee under [illegible] thereto of Glenn E. [illegible] and New England Tan [illegible] as trustees under the [illegible] deceased, to file [illegible] the fee title to the [illegible]

"4. That on, to wit: February 25, 1935, a hearing was had on said intervening petition and the answers filed thereto after service of summons on all necessary parties, and that said hearing was continued to March 8, 1935; that said hearing was reset for March 25, 1935; that on March 25, 1935, an order was entered herein ordering that the intervening petition hereinabove referred to, together with the answers and replications filed thereto, be referred to one of the Masters in Chancery of this court who was instructed to take testimony and make a full report as to the findings, which order also provided that no fees be paid to any attorney in connection with said reference; that full hearings were had before the Master in Chancery as to the merits of the intervening petition and the offer made by said intervenors with reference to the termination of the leasehold estates, and that the said Master permitted evidence to be taken as to the fairness of other offers to reorganize and rehabilitate the said leasehold estates and that after various hearings extending over a period of more than thirty days, the Master issued his report and there were no objections thereto; that on, to wit: May 20, 1935, full hearing was had before this Court on the Master's report and on the motion to enter a decree in accordance with the findings hereof, and that said hearing was again continued to May 29, 1935, for the express purpose of permitting counsel for the present petitioners to present his cause to the Federal Court for the Northern District of Illinois in the cause therein pending entitled 'In the matter of Sherman Garage, No. 59257,' being proceedings pending under Section 77-B of the Bankruptcy Act, as amended, which proceedings allege to involve the property described in the decree of foreclosure and sale entered herein;

"5. That on May 29, 1935, this Court was informed that the Hon. John P. Barnes, one of the Judges of the Federal District Court, dismissed the petition of the petitioners, H. R. Halterman and others, to reorganize the property involved herein under Section 77-B of the Bankruptcy Act, as not having been filed in good faith, and that this Court was the only Court having jurisdiction of the parties and the subject matter before whom questions involved herein were properly pending; that on said date a decree was entered herein which provided, among other things, for the termination of the leasehold estates and that the receiver heretofore appointed in this cause be directed to deliver to the intervening petitioners, owners of the fee, possession of the premises involved herein upon payment to the receiver of the cash sum of $40,000, all in pursuance of the Master's report and recommendations and the evidence and testimony taken in this cause;

"6. That Max Richmond Kargman, attorney for H. R. Halterman et al., was present in open court at the time of the entry of said decree on May 29, 1935, and had full knowledge of the contents thereof and participated in the hearing had thereon.

"7. That a motion was made by the American National Bank and Trust Company, on May 29, 1935, successor trustee under the first mortgage leasehold trust deed involved herein, for an order on the receiver to turn over the said sum of $40,000 paid to him on May 29, 1935, by the intervening petitioners, Robert P. Bass et al., and also such other funds as may remain in his hands for purposes of distribution to the holders of first mortgage leasehold bonds secured by said leasehold trust deed, and that said motion was continued at various times to June 4, 1935, at which time a full hearing was had thereon, and all parties in interest were ordered to answer or file objections to the petition of American National Bank and Trust Company of Chicago, as successor trustee;

"4. That on, to wit: [illegible] had on said intervening petition [illegible] after service of summons on [illegible] hearing was continued [illegible] reset for March 16, 1933; [illegible] entered herein [illegible] referred to, [illegible] therefore, be referred to [illegible] court who was interested [illegible] to the filing, [illegible] to any attorney in [illegible] ings were had [illegible] intervening petition [illegible] reference to the [illegible] the said Master [illegible] of other [illegible] estates and that after various [illegible] more than thirty days, [illegible] no objections therefor [illegible] was had before said [illegible] to enter a decree in [illegible] said hearing [illegible] purpose of permitting [illegible] present his claim to the [illegible] of Illinois in the [illegible] of Sherman Savage, [illegible] Section 77-3 of the [illegible] allege to involve the [illegible] closure and sale [illegible]

"5. That on [illegible] the Hon. John [illegible] Harris, one of the judges of the Federal District Court, dismissed the petition of the petitioner [illegible] and others, to reopen the [illegible] 77-3 of the Bankruptcy [illegible] and that this court [illegible] partition and the only [illegible] were properly [illegible] which provided, upon [illegible] hold estates are [illegible] be directed to divide [illegible] fee, possession of [illegible] receiver of the said [illegible] report and recommendation [illegible] this cause;

"6. That [illegible] et al., [illegible] decree [illegible] of and partition [illegible]

"7. That a motion [illegible] and Trust Company, [illegible] first mortgage foreclosure [illegible] the receiver to turn over [illegible] May 20, 1933, by the [illegible] and also such other [illegible] of distribution to the holders of [illegible] secured by said Leasehold [illegible] tinued at various times [illegible] ing was had thereon, and [illegible] answer or file objections [illegible] and Trust Company [illegible]

"8. That on June 11, 1935, a full hearing was had on said petition and the answers filed thereto, at which time counsel for petitioners, H. R. Halterman and others, were present, and after a full hearing upon the merits of the petition of the said trustee, an order was entered herein directing the receiver to deliver to said trustee the said sum of $40,000 and to make payment of additional sums out of the moneys in the hands of said receiver, as provided in said order;

"9. That on the same date, June 11, 1935, the petitioners, H. R. Halterman and others, through their counsel, Max Richmond Kargman, presented a petition praying for leave to intervene in this proceeding on behalf of certain holders of leasehold bonds, the majority of which had deposited their bonds with the committee for the protection of the holders of first mortgage bonds sold through American Bond & Mortgage Company, which committee had consented to the decrees and orders heretofore entered herein, and the Court, upon examination of said petition, found there were no new matters presented therein which had not prior thereto been fully heard by the Master in Chancery and by this Court upon various occasions as herein set forth, and that this Court held that to permit the filing of said intervening petition would merely prolong the litigation in this cause and unduly burden the parties in interest with costs and expenses that would be unwarranted, and that said petition was without merit, either in law or in fact; that thereupon, an order was entered herein denying the motion of said H. R. Halterman and others, by their attorney, Max Richmond Kargman, to intervene. That at said hearing this Court stated that the said counsel for the intervening petitioners could present, if he so desired, certain authorities to the Court and that the Court, after examination of said authorities, would notify all counsel of record if not convinced of the propriety of the proceedings had in this cause, by Saturday, June 15, 1935; and further that this Court advised all counsel present that it would not be necessary to appear before this Court on Saturday, June 15, 1935, unless they were so notified.

"10. That on Saturday, June 15, 1935, the said Max Richmond Kargman, attorney for H. R. Halterman and others, appeared before the Court without notice to counsel of record and requested this Court to permit him to file on behalf of said proposed intervening petitioners an amended petition to intervene, and this Court refused to enter such an order or permit any intervention without notice to counsel of record.

"11. That thereafter on June 20, 1935, upon due notice, the said H. R. Halterman and others, by their attorney, Max Richmond Kargman, moved the Court for leave to file an amended petition to intervene, and the Court, after examination of said petition, finds that said amended petition is without merit, either in law or in fact, and is substantially the same as the original petition, the prayer of which this Court denied on June 11, 1935, and the Court having heard all of the matters raised by said amended petition and being fully advised in the premises, and after full hearing in the matter, and acting in the reasonable exercise of its discretion in the matter.

"It Is Ordered that the motion of H. R. Halterman and others, made by their attorney, Max Richmond Kargman, to file herein their intervening amended petition, be and the same is hereby denied.

"8. [illegible] said petition and the [illegible] counsel for [illegible] present, [illegible] petition [illegible] directing the [illegible] sum of $40,000 [illegible] the moneys in the [illegible] order;

"9. That [illegible] tioners, [illegible] Max Kleinwort [illegible], [illegible] to intervene in this proceeding [illegible] of certain [illegible] issued bonds, the [illegible] with the committee [illegible] mortgage bonds [illegible] which committee [illegible] fore entered herein, and [illegible] petition, found that [illegible] had not prior thereto [illegible] and by this Court upon [illegible] that this Court hold [illegible] petition would merely [illegible] duly burden the petition in [illegible] would be unwarranted, [illegible] either in law or in [illegible] herein denying the motion [illegible] their attorney, [illegible] hearing this Court [illegible] venting petitioners could [illegible] orities to the Court and [illegible] authorities, would notify all [illegible] of the property of the [illegible] June 15, 1935; and further that this [illegible] present that it would not be [illegible] on Saturday, June 15, 1935, unless [illegible]

"10. That on Saturday, June [illegible] Kergman, attorney for [illegible] Court without notice to [illegible] to permit him to file on behalf of [illegible] tioners an amended petition to intervene [illegible] enter such an order or [illegible] counsel of record.

"11. That [illegible] the said H. [illegible] Kergman, moved the [illegible] intervene, and the [illegible] that said amended [illegible] fact, and in such [illegible] prayer of which this [illegible] having heard all of the [illegible] being fully advised in [illegible] matter, and [illegible] the matter.

"It is Ordered [illegible] made by their attorney, [illegible] intervening amended petition, [illegible] denied.

"It Is Further Ordered, and therefore the prayer of said petition is hereby denied."

The material parts of the petitions, as stated by petitioners in their brief, are, in substance, as follows: That the petitioners were not made parties to the intervening petition of the lessors and had no notice of the proceedings until after the decree was entered; that the ten bondholders made parties to the petition to represent the non-depositing bondholders did not appear and defend and did not properly represent that class, and that the proceedings for forfeiture were wholly foreign to a court of equity; that the offer of the lessors was unfair and inequitable; that said Bondholders' Committee in accepting it did not act in good faith and did not protect the petitioners' and other bondholders' interests in that the committee, through its chairman, attempted to operate said property, although its chairman had no experience whatsoever in such business; that the committee permitted the trustee and its counsel to withdraw from the estate numerous and excessive sums of money, which depreciated the estate and directly contributed to the condition of default existing in taxes and ground rent; that the trustee and its counsel were guilty of malfeasance and misfeasance in that they secured the payment to themselves of sums of money unlawfully and improperly and should be made to account for said sums; that Chicago Title and Trust Company, as receiver, and the chairman of the committee received improper and excessive fees in connection with the operation of the property and should be made to return to the estate the moneys so secured; that if all of the moneys that were improperly and unlawfully withdrawn from the estate were returned to it the defaults, if any, in the ground rent and taxes would be substantially diminished and the bondholders would have the benefit of the property which rightfully they should have; that the building erected on the land cost in excess of $500,000 and was worth not less than $400,000;

"It is further ordered, and from [illegible] the power of said petition is hereby denied."

The material parts [illegible] petition [illegible] their brief, are, in substance, [illegible] were not made parties to the intervening [illegible] and had no notice of the [illegible] was entered; that the ten condemnation [illegible] petition to represent the non-intervening bondholders [illegible] defend and did not properly represent [illegible] proceedings for foreclosure [illegible] of quality that the offer of the [illegible] Bondholders' Committee in [illegible] did not protect the petitioners' [illegible] that the committee, through its chairman, [illegible] property, although its chairman had no experience [illegible] business; that the committee [illegible] to withdraw from the secret [illegible] which deprecated the [illegible] tion of default existing in [illegible] and its counsel were guilty of [illegible] assured the payment to [illegible] property and should be [illegible] Title and Trust Company, [illegible] received improper [illegible] of the property and should be [illegible] so secured; that if all of the [illegible] fully withdrawn from [illegible] any, in the ground [illegible] and the bondholders [illegible] rightfully they should have [illegible] cost in excess of $500,000 [illegible]

that the bondholders have a substantial interest in the property and the offer of $40,000 was grossly unfair and inequitable; that the ground lessors took no action to enforce the defaults at the time when they knew or should have known of the improper distribution of moneys to the trustee and its attorneys; that the ground lessors entered into negotiations with the Bondholders' Committee to reduce the rent due under the leases and made tentative agreements for reduction of the rents and for arranging the rental upon a basis so that the payments could be made; that for two years the ground lessors permitted defaults to continue and at the same time were negotiating for a revision of the leases; that this conduct of the lessors "lulled the parties into a sense of security as did their negotiations for a reduction and revision for the terms of the leases;" that the lessors were now seeking to enforce the strict covenants of the leases and to "enforce a forfeiture thereof and thus unjustly enrich themselves at the expense of the great number of persons who were lulled into a sense of security by the previous acts of the lessors;" that the court should not permit them to enforce forfeitures in an equity proceeding because the forfeitures arose largely on account of the conduct of the lessors; that the court should restrain them from forfeiting the leaseholds and should assume jurisdiction for the working out of a reorganization plan; that the lessors have no right to forfeit the leases under any conditions in a court of equity, and that the decree should be vacated and set aside and their intervening petition should be dismissed; that a plan of reorganization might be evolved for the protection of all the parties herein, and that an accounting should be had of the sums of money unlawfully withdrawn.

Appellants contend that "a Court of equity should not entertain a petition or proceeding to forfeit a leasehold," and that "the lack of jurisdiction of a Court of equity to enforce a

that the bondholders have a substantial interest in the property and the offer of [illegible] was proper. [illegible] the ground lessors took no action to enforce their rights at the time when they knew or should have known of the improper distribution of moneys to the trustee and its attorneys; that the ground lessors entered into negotiations with the bondholders' committee to reduce the rent due under the lease and made tentative arrangements for reduction of the rents and for [illegible] upon a basis so that the payments could be made; that for two years the ground lessors permitted defaults to continue and at the same time were negotiating for a revision of the leases; that this conduct of the lessors "lulled the parties into a course of security and old their negotiations for a reduction and revision of the terms of the leases;" that the lessors were now seeking to enforce the strict covenants of the leases and to "enforce a forfeiture thereof in some unjustly enrich themselves at the expense of the great number of persons who were lulled into a sense of security by the previous rate of the lessors;" that the court should not permit them to enforce forfeitures in an equity proceeding because the [illegible] on account of the conduct of the lessors; that the court should restrain them from forfeiting the leaseholds and should assume jurisdiction for the working out of a reorganization plan; that the lessors have no right to forfeit the lease under any conditions in a court of equity, and that the decree should be reversed [illegible] their intervening petition should be dismissed; that a plan of reorganization might be evolved for the protection of all the parties herein, and that an accounting should be had of the sums of money unlawfully withdrawn.

Appellants contend that "a court of equity should not entertain a petition or proceeding to forfeit a leasehold," and that "the lack of jurisdiction of a Court of equity to enforce a

forfeiture may be raised after decree and even in the Appellate Court in the first instance." It is undoubtedly the law that a lessor cannot by a bill in equity have a lease set aside on the ground of forfeiture, as it is a settled doctrine that a court of equity will not interfere on behalf of the party entitled to enforce a forfeiture, but will leave him to his legal remedies. But there is an equally well settled principle of law that when a court of equity once acquires jurisdiction it may retain the cause for all purposes and administer legal redress as well as equitable relief and will dispose of all questions arising between the parties, whether such questions are legal or equitable. In the instant case, when the intervening petition of the lessors was filed the court still had jurisdiction in the foreclosure proceedings and the property in question was in custodia legis. If the lessors had started legal proceedings that might affect the possession of the property without the sanction of the court appointing the receiver, such action would have constituted contempt of that court. The trial court had the right to try the petition or enter an order permitting the lessors to have the question tried in a court of law. As the court had possession of the property, the chancellor decided, wisely, we think, to try the petition. If no receiver had been appointed in the foreclosure proceedings, or if one had been appointed but had been discharged prior to the filing of the lessors' intervening petition, the lessors would not have had the right to intervene in said proceedings. The case of Gunning v. Sorg, 214 Ill. 616, supports the procedure followed by the trial court. There Sorg executed to Gunning a 99-year lease on certain premises in Chicago. A trust deed was executed by Gunning to one Phillips on the leasehold estate. The lessee defaulted in the payment of certain quarterly installments of rent, and the lessor served notice of default and thereafter instituted a suit of forcible detainer. Before

forfeiture may be waived, above d[illegible] even if when [illegible] pleadings court in the first instance. [illegible] the law [illegible] the law that a lessor cannot by [illegible] waive [illegible] right on the ground of forfeiture, [illegible] court of equity will not interfere [illegible] relief to enforce a forfeiture, but will [illegible] legal remedies. But there is an equity [illegible] of law that when a court of equity once requires jurisdiction [illegible] the cause for all purposes and administer legal [illegible] will be enjoinable relief and will dispose of all questions [illegible] whether such questions are legal or equitable. In the instant case, when the interpleader [illegible] court still had jurisdiction in [illegible] and the property in question was in [illegible] and started legal proceedings [illegible] of the property without the [illegible] court [illegible] such action would have [illegible] trial court had the right to try the [illegible] on cross petitioning the lessor to have the question [illegible] law. As the court had [illegible] wisely, we think, to try the [illegible] appointed in the foreclosure proceedings, [illegible] but had been discharged prior to the filing of the cross-intervening petition, the lessor could not have [illegible] venue in said proceedings. The case of Dunning v. [illegible] 616, supports the proposition [illegible] Story executed to Dunning a 5-year lease on part of premises in Chicago. A trust deed was executed by Dunning to one Phillips on the leasehold estate. The lease defaulted in the payment of certain quarterly instalments of rent, and the lessor served notice of default and thereafter instituted a suit or forcible detainer. Before

that suit could be heard Phillips filed a bill for foreclosure on the leasehold estate, a receiver was appointed, and Sorg then filed an intervening petition setting up the conditions of the lease, the default in the payment of the rent, and averring that the trust deed to Phillips had been executed without petitioner's knowledge and consent, and asking that the same be declared null and void as against his interest, that he be decreed to be entitled to the possession of the premises, and that the lease and trust deed be canceled and set aside. The final decree entered by the trial court ordered that the lease and trust deed be set aside and annulled and that possession of the premises be given to petitioner. (See Gunning v. Sorg, 113 Ill. App. 332, 337.) In the Supreme court, in answer to a contention that the decree was wrong because a court of equity could not enforce a forfeiture, the court said (214 Ill. 616, 624-6):

"It is urged that the latter decree was wrong, for the reason that a court of equity will not enforce a forfeiture. It is familiar doctrine that a court of equity will not actively interfere to enforce a forfeiture. (1 Pomeroy's Eq. Jur. sec. 459.) But it is equally well settled that when a court of equity has acquired jurisdiction over a cause for any purpose it may go on to a complete adjudication, and may establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority. In such a case it will not remit a party to his remedy at law, but will decide all issues and make a decree-granting full relief to all the parties. (Ibid. 181, 236.) In suits in equity where the right of possession of real property is involved, it is not only proper, but the duty of the court, on the completion of the suit, to put the successful claimant in possession of the premises. (Harding v. LeMoyne, 114 Ill. 65.) Although a bill in equity cannot be maintained merely for the enforcement of a legal right, if the controversy contains any equitable feature which authorizes a court of equity to take cognizance, that court will retain jurisdiction for all purposes and will establish merely legal rights and grant legal remedies. (Stickney v. Goudy, 132 Ill. 213.) In Link Belt Machinery Co. v. Hughes, 195 Ill. 413, it was said that a court of equity having by its receiver taken possession of appellee's property in that case, and having by its orders taken his rights under its protection, was bound to protect him without driving him to a suit at law to enforce such rights. That rule applies here. Phillips, the complainant in the original bill, invoked the jurisdiction of a court of equity for the foreclosure of the trust deed and prayed for the appointment of a receiver to take possession of the premises. Gunning entered his appearance and expressly consented to the appointment of the receiver. The receiver was appointed and the property was thereby brought under the control of the court to be disposed of according to the rights of the parties, and the court, having acquired jurisdiction, might then adjudge the rights of all parties to the suit although it involved the grant-

that suit could [illegible]

the leasehold estate [illegible]

an intervening petition [illegible]

defaults in the payment [illegible]

to Phillips had [illegible]

consent, and [illegible]

against his interest, [illegible]

possession of the property [illegible]

cancelled and set aside. The trial court [illegible]

ordered that the lease and [illegible]

that possession of the property [illegible] writing

v. Zorn, 111 Ill. App. [illegible]

to a construction [illegible]

could not enforce [illegible]

"It is urged [illegible]

reason that a court of equity will not [illegible]

is familiar doctrine [illegible]

interfere to enforce [illegible]

455.) But it is equally well [illegible] equity has accepted jurisdiction [illegible] on to a complete adjudication [illegible]

rights and grant legal remedies [illegible]

the scope of its authority [illegible]

party to his remedy at law [illegible]

a decree granting full relief [illegible]

256.) In suits in equity [illegible]

property is involved [illegible]

court, on the completion of [illegible] in possession of the premises [illegible]

Although a bill in equity [illegible]

enforcement of a legal right [illegible]

equitable factors which [illegible]

misuse, that court will [illegible]

will establish merely [illegible]

v. Dunky, 152 Ill. [illegible]

Ill. 415, it was [illegible]

taken possession [illegible]

its orders taken [illegible]

him without [illegible]

rule applies here [illegible]

involved the institution [illegible]

the trust deed and [illegible]

possession of the premises [illegible]

expressly contended [illegible]

was adjudged and [illegible]

of the court to [illegible]

tion, and the court, having [illegible] Judge

the rights of all parties [illegible] had lived the grant-

ing of legal remedies. (17 Ency. of Pl. & Pr. sec. 766.) The receiver did not hold the property for Phillips or for Gunning or for any other person, but for the one who in the end should show himself entitled to it. The property having legally come into the possession of the receiver, it could not be interfered with by any person claiming an interest in it without leave of court, but Sorg could either ask the court for leave to assert his title to the property in the possession of the receiver by a suit at law or to have it determined in the receivership. The court, in its discretion, could either try the case itself and determine his right to the property or permit the question to be tried in a court of law. (17 Ency. of Pl. & Pr. 775-792.) The court determined to try the question itself and came to a correct conclusion as to the rights of the parties. The lease had been forfeited, and Sorg was entitled to possession of the property when possession was taken by the court through its receiver. When the receivership came to an end it was within the power and duty of the court to determine to whom the possession should be surrendered by the receiver, and having ascertained that Sorg was entitled to it, it would not be in accordance with equity to order it returned to one of the parties who had no right, legal or equitable, to it."

The procedure followed in the instant case was also followed in Chicago Trust Co. v. 12-14 W. Washington St. Bldg. Corp., 278 Ill. App. 117, but there no question seems to have been raised as to the right of the lessors to file their intervening petition. In the recent case of Escher v. Harrison Securities Co., 79 Fed. (2d) 777, it was held that a landlord was entitled, in receivership proceedings in the Federal court or in a state court, to take action to forfeit a lease and to repossess leased property because of nonpayment of rent and nonperformance of other forfeiting covenants. In its opinion the court cites a number of cases that seem to support the procedure here followed.

Appellants contend that none of the bondholders selected by the lessors to represent the class of non-depositing bondholders appeared and defended on behalf of that class, and, therefore, the appellants should have been given leave to appear and defend. The order entered by the chancellor on June 22, 1935, disposes of the argument that the views of the non-depositing bondholders were never considered. That order shows the active part taken by counsel for appellants in important hearings before and at the time of the entry of the decree. It further shows that counsel for petitioners

Halterman and others was present on June 11, 1935, when a full hearing was had upon the merits of the petition of the trustee for an order on the receiver to turn over the sum of $40,000 for purposes of distribution to the holders of the first mortgage leasehold bonds. Counsel for appellants, upon the oral argument in this court, conceded that he represented certain non-depositing bondholders in the hearings before the chancellor on May 20, 1935; May 29, 1935, and June 11, 1935, and that he also represented certain non-depositing bondholders in the cause in the Federal court. While no objections were filed to the master's report, nevertheless, the chancellor gave a full hearing upon the report, in which counsel for appellants participated. The decree in question was entered on May 29, 1935, but counsel for appellants did not see fit to present a petition for leave to intervene in the proceeding until June 11, 1935. We cannot commend the practice followed by the counsel. After the bondholders had learned of the offer of the lessors there still remained on deposit with the Bondholders' Committee 89.8 per cent of the total bonds outstanding. After the chancellor had approved the offer it was reported to all of the bondholders, approximately three months prior to the entry of the decree. The several postponements given counsel for appellants by the chancellor show clearly that the latter was willing to give the counsel a full opportunity to present the views of the non-depositing bondholders, and it seems idle to argue that such bondholders were not given an opportunity to be represented before the entry of the decree. The failure of the appellants to present, in apt time, a petition for leave to intervene and to file formal objections to the master's report, is not chargeable to the chancellor nor to the appellees.

The argument of counsel for appellants that the lessors lulled the parties into a sense of security and thereby waived

Haltiman and [illegible] that
hearing was had upon [illegible] the trustees
for an order on the [illegible] for the
purposes of distribution [illegible] bondholders
leasehold bonds. [illegible] argument
in this court, [illegible] depositing
bondholders in the [illegible] 1932;
May 26, 1932, and [illegible] certain non-depositing bondholders.
While no objections [illegible] leases, the chancellor filed [illegible] in which
counsel for appellants [illegible]
entered on May 26, 1932, [illegible] to present a petition [illegible] until
June 13, 1932. [illegible] counsel. After [illegible] leases there still [illegible] bondholders'
committee 88.8 per cent [illegible] the chancellor had [illegible] of
the bondholders, [illegible] to the entry of
the decree. The several petitions [illegible] by the chancellor [illegible] give
the counsel a full opportunity [illegible] non-depositing bondholders [illegible] bondholders were not [illegible] the
entry of the decree. [illegible] petitions in
the app time, [illegible] counsel
objections to the [illegible] chancellor not to the [illegible].

The argument [illegible] leases
failed the parties into [illegible] by waived

the strict provisions of the lease as to forfeiture is without merit. The evidence shows that the lessors were patient and that they were willing to change the terms of the lease "to allow the property to be worked out," but their efforts in that direction failed. While they were entitled under the provisions of the lease to a forfeiture without compensation, they saw fit to make the offer in question and it was approved by the Bondholders' Committee, by the master after a full hearing, and by the chancellor after he had given appellants' counsel a full opportunity to be heard. From the report of the master and the findings in the decree it seems reasonably clear that the property was hopelessly involved and could not be saved to the bondholders. Ninety per cent of the bondholders, after a full consideration of the situation, were willing to accept the offer. None of the appellants have offered at any time, even in their petitions, to redeem any of the defaults. Indeed, in their petitions, they present no feasible plan to save the property for the bondholders.

The appellees have made a motion in this court that the appeal be dismissed. It will be denied.

The judgment order of the Circuit court of Cook county of June 18, 1935, denying the motion of appellants to intervene and file an intervening petition, and the judgment order of June 22, 1935, denying leave to appellants to file their amended petition, are affirmed.

JUDGMENT ORDER OF JUNE 18, 1935, DENYING MOTION OF APPELLANTS TO INTERVENE AND FILE AN INTERVENING PETITION, AND JUDGMENT ORDER OF JUNE 22, 1935, DENYING LEAVE TO APPELLANTS TO FILE THEIR AMENDED PETITION, AFFIRMED.

Sullivan and Friend, JJ., concur.

the strict provisions [illegible]

merit. The evidence [illegible]

they were willing to [illegible]

property to [illegible]

failed. While [illegible]

to a forfeiture without [illegible]

in question and it [illegible]

the master after a full hearing [illegible]

given appellants' counsel a full opportunity [illegible]

report of the master [illegible]

ably clear that the property [illegible]

be saved to the bondholders. [illegible]

after a full consideration [illegible]

the offer. None of the [illegible]

in their petitions, to [illegible]

petitions, they present no [illegible]

the bondholders.

The appellees [illegible]

appeal be dismissed. [illegible]

The judgment [illegible]

June 18, 1938, denying the motion of [illegible]

file an intervening [illegible]

1938, denying leave to [illegible]

are affirmed.

[illegible]

Sullivan and Brown, [illegible], concur.

81 4

38647

EDWIN L. BRASHEARS, (Respondent) Appellee, v. JAMES C. O'BRIEN, (Petitioner) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

285 I.A. 593

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee of the trustee in bankruptcy of the Whitestone Management Company, which company operated the Drake hotel, sued defendant for $344 balance alleged to be due plaintiff from defendant for rentals of the ballroom at the Drake hotel. Defendant's amended affidavit of merits alleges that plaintiff was not the bona fide owner of the claim, denies that the "rooms" rented were "given and delivered to defendant at his special instance and request," and denies that defendant was indebted to plaintiff in any sum whatsoever. After a jury had returned a verdict finding the issues against plaintiff, the latter's motion for a new trial was granted. Defendant then filed, in this court, his petition for leave to appeal from the order of the trial court granting plaintiff a new trial, which leave to appeal was allowed. Plaintiff has not filed an appearance nor a brief in this court.

This court is not aided by a statement of the trial judge giving his reasons for the allowance of the motion for a new trial, but we are satisfied, from an inspection of the short record in the case, that defendant's contention that "the only point on which the court could have granted the new trial was on the weight of the

38647

[illegible]
(Respondent) Appellee,

v.

JAMES C. O'BRIEN,
(Petitioner) Appellant.

[illegible]

MR. [illegible]

Plaintiff, [illegible] the [illegible] the Drake Hotel, and [illegible] due plaintiff from [illegible] the Drake Hotel. [illegible] that plaintiff was not the [illegible] that the "rooms" rented [illegible] at his residence in Denver [illegible] was indebted to plaintiff [illegible] had returned a verdict [illegible] the latter's motion [illegible] filed, in this court, [illegible] order of the trial court [illegible] leave to appeal was allowed. [illegible] nor a brief in this court.

This court is not [illegible] giving his reasons for the [illegible] but we are satisfied, from [illegible] case, that defendant's contention [illegible] court could have [illegible] of the

evidence," is correct.

Defendant contends that "the verdict of the jury was in accordance with the weight of the evidence," and that "the trial court usurped the functions of the jury in granting a new trial to plaintiff." In passing upon this contention we have seen fit to read the entire transcript of the evidence, which consists of oral and documentary proof, and after a careful consideration of all of the facts and circumstances of the case we are satisfied that we would not be justified in sustaining defendant's contention.

The order of the Municipal court of Chicago granting plaintiff a new trial is affirmed.

ORDER GRANTING PLAINTIFF A
NEW TRIAL AFFIRMED.

Sullivan and Friend, JJ., concur.

evidence," is correct.

Defendant contends that the jury, or the jury was in accordance with the weight of the evidence," and that "the trial court usurped the function of the jury in granting a new trial to plaintiff." In passing upon this contention we have been fit to read the entire transcript of the evidence, which consists of oral and documentary proof, and after a careful consideration of all of the facts and circumstances of this case we are satisfied that we would not be justified in reversing the order complained of.

The order of the municipal court in granting a new trial to plaintiff is affirmed.

[illegible]

Sullivan and Friend, JJ., concur.

82 A

38676

THEODORE J. JOHNSON,
Appellant,

v.

THEODORE A. BUENGER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

285 I.A. 593

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff confessed judgment in the sum of $5,467.96 against defendant for alleged unpaid principal and interest due on five promissory notes executed by defendant. Defendant filed a verified petition to vacate the judgment, in which he alleged that "the amount of money actually borrowed and received from the plaintiff by the defendant was less than the amounts specified in said notes, being so made as to cover up a usurious charge of interest made by the plaintiff." The petition sets up in detail the alleged facts in connection with each of the notes. Leave was given defendant to appear and defend, the judgment to stand as security and the petition to stand as defendant's affidavit of merits. The cause was tried by the court without a jury, and the judgment was reduced to $52.34 and confirmed in that amount.

Plaintiff's statement of claim alleges:

"Plaintiff's claim is for money due upon five certain promissory notes, the amounts, dates and maturities of each of said notes being as follows:

Amount	Dated	Due Date
$5,000	6/1/27	6/1/28
3,600	9/1/27	9/1/28
4,000	11/1/27	11/1/28
4,500	12/1/27	12/1/28
4,500	5/1/28	5/1/29

that there is due on the first promissory note the principal sum of $661.94 together with interest thereon to December 15, 1934

38676

THEODORE T. JOHNSON,
Appellant,

v.

THEODORE A. BUSHEM,
Appellee.

Mr. [illegible] for appellant.

Mr. [illegible] for appellee.

Plaintiff contested judgment in the sum of $[illegible] 7.50 against defendant for alleged unpaid principal and interest due on five promissory notes executed by defendant. [illegible] filed a verified petition to vacate the judgment, in which it [illegible] that "the amount of money [illegible] from the plaintiff by the defendant [illegible] notes, being no more [illegible] to cover by a usurious charge of interest made by the plaintiff. [illegible] the petition [illegible] if the alleged facts in connection with each of the notes. [illegible] given defendant to appear and defend, the judgment [illegible] authority and the petition to stand as defendant's affidavit of merits. The cause was tried by the court without a jury, and the judgment was reduced to $52.34 and confirmed in that amount.

Plaintiff's statement of claim alleges:

"Plaintiff's claim is for money due upon five certain promissory notes, the amounts, [illegible] and maturities of each of said notes being as follows:

Amount	Issued	Maturities
$5,000	6/1/27	6/1/28
5,000	9/1/27	[illegible]/1/28
4,000	11/1/27	11/1/28
4,500	12/1/27	12/1/28
4,500	1/1/28	1/1/29

that there is due on the first promissory note the principal sum of $661.94 together with interest thereon to December 15, 1934

in the sum of $66.49; that there is due on the second promissory note the principal sum of $874.90 together with interest thereon to December 15, 1934 in the sum of $250.94; that there is due on the third promissory note the principal sum of $850.00 together with interest thereon to December 15, 1934 in the sum of $169.13; that there is due on the fourth promissory note the principal sum of $903.62 together with interest thereon to December 15, 1934 in the sum of $79.03; that there is due on the fifth promissory note the principal sum of $1,121.07 together with interest thereon to December 15, 1934 in the sum of $187.77."

Defendant claimed that as to each of the notes the discount deducted and the interest contracted for exceeded sixteen per cent for one year; that the five loans were usurious and plaintiff, therefore, forfeited all interest; that all payments made to plaintiff on account of the notes must be credited toward the principal; that there was nothing due to plaintiff on notes Nos. 1 to 4, both inclusive, and as to note No. 5 defendant owed plaintiff the sum of $52.34. At the outset of the hearing counsel for plaintiff made the following statement to the court: "Now the facts that we can stipulate to, Judge, are the amount of money that was paid by the plaintiff to the defendant for the notes - I think we have those." It was then stipulated that plaintiff paid $4,500 on note No. 1 and was paid on that note $5,215; that plaintiff paid $3,240 on note No. 2 and was paid on that note $3,279; that plaintiff paid $3,610 on note No. 3 and was paid on that note $3,750; that plaintiff paid $4,050 on note No. 4 and was paid on that note $4,366.80, and that plaintiff paid $4,095 on note No. 5 and was paid on that note $4,042.66; that each of the notes bears interest at six per cent per annum, payable semi-annually. After the parties had stipulated as aforesaid plaintiff introduced the notes in evidence and rested.

It is conceded, of course, that it is usury to make a loan in a certain amount and to receive a note for a larger amount, where the discount and interest exceed the lawful rate. Plaintiff's claim is that he had no dealings with defendant and that he purchased all of the notes from the Monroe Securities Corporation, owned and controlled by Dovenmuehle, Inc., and his theory of law is that the

in the sum of $[illegible]; that there is due on the second promissory note the principal sum of $[illegible] together with interest thereon to December 15, 1934 in the sum of $[illegible]; that there is due on the third promissory note the principal sum of $[illegible] together with interest thereon to December 15, 1934 in the sum of $[illegible]; that there is due on the fourth promissory note the principal sum of $[illegible] together with interest thereon to December 15, 1934 in the sum of $[illegible]; that there is due on the fifth promissory note the principal sum of $[illegible] together with interest thereon to December 15, 1934 in the sum of $[illegible]."

Defendant claims that as to each of the notes [illegible] owner accepted and the interest coupons [illegible] accepted [illegible] for one year; that the five [illegible] were mutilated [illegible], therefore, forfeited all interest; [illegible] made [illegible] on account of the notes must be [illegible] that there was nothing due [illegible] conclusive, and as to note [illegible] and plaintiff [illegible] the sum of $[illegible]. At the outset of the hearing counsel for [illegible] made the following statement [illegible] stipulate to, Judge, are the [illegible] plaintiff to the defendant for the notes [illegible]." It was then stipulated that plaintiff [illegible] on note No. 1 and was paid on that note $[illegible]; that plaintiff [illegible] on note No. 2 and was paid on that note $[illegible]; that plaintiff [illegible] on note No. 3 and was paid on that note $[illegible] plaintiff paid $4,080 on note No. [illegible] and was paid on that note $[illegible], and that plaintiff paid $[illegible] on note No. [illegible] $4,042.66; that each of the notes [illegible] per annum, payable semi-annually. [illegible] as aforesaid plaintiff introduced the notes in evidence and rested.

It is conceded, of course, that it is [illegible] to make a loan in a certain amount and to receive a note for a larger amount, the difference being the discount and interest exceed the legal rate. Plaintiff's claim is that he had no dealings with defendant and that he purchased all of the notes from the Monroe Construction Corporation, owned and controlled by Davenwenfle, Inc., and his theory of law is that the

"purchase of a note in the usual course of business at a discount greater than the rate of interest allowed by law is not usury." The defendant's claim is that plaintiff made the loans to him and that while in form the transactions on their face might appear to be a purchase, the form used was a mere device or scheme to cover usury. Both parties conceded, upon the trial, that the sole issue of fact was: "Were the transactions loans to defendant, or were they purchases of notes from Monroe Securities Corporation?" That was the only issue of fact raised by the pleadings. It is not disputed that if the notes represented loans to defendant plaintiff was guilty of usury and the final judgment of the court was correct.

Ruth C. Greenfield, the only witness who testified for defendant, worked for Monroe Securities Corporation and also for Dovenmuehle, Inc. She testified that she handled the transactions with plaintiff in reference to the five notes. Plaintiff testified, "I had all my dealings with Miss Greenfield on these notes;" that while defendant might, possibly, have been there when he bought the notes, plaintiff never talked with him about the notes. Miss Greenfield further testified that plaintiff made loans from time to time through their office; that these loans were made mostly to defendant. As to note No. 1 she testified: "It is a note for $5,000. It was made in 1927. This paper was made out and the note was given to him, and I gave the note to him myself. * * * Q. Now who was this loan made to? A. Well, to Mr. Buenger." The witness testified to the same effect as to the other notes. Upon cross-examination the following occurred: "Q. Now, Miss Greenfield, I understood you to say that with respect to plaintiff's exhibit 1, being the first note that was handed to you, that in explaining this transaction that Mr. Johnson came in and he had some money to loan or invest and the note was made out and given to him? A. Yes, sir. Q. Is that right? A. Yes. * * * Q. When Mr. Johnson came in the note was

"purchase of a note [illegible] of or [illegible] greater than the rate of interest allowed by law in [illegible]. The defendant's claim is that Lakhani [illegible] the loan [illegible] that while in [illegible] on their [illegible] be a purchase, the [illegible] or a [illegible] to cover usury. Both parties [illegible], upon the [illegible], the [illegible] of fact was [illegible] purchase of notes" [illegible] the only issue [illegible]. It is [illegible] that if the notes represented [illegible] of usury and the final judgment [illegible] correct.

"[illegible] Greenfield, [illegible] who [illegible] defendant, worked for [illegible] Corporation [illegible] Government, Inc. [illegible] that she handled the [illegible] with plaintiff in reference to the five notes. [illegible] fied, "I had all my dealings with [illegible] that while defendant might, possibly, have [illegible] the notes, plaintiff never [illegible] Miss Greenfield further [illegible] time through their of [illegible] defendant. As to [illegible] It was made in 1927. This paper was [illegible] given to him, and I have the note to him myself. [illegible] this loan made to [illegible] to Mr. [illegible] fied to the same effect as to the other notes. [illegible] the following occurred: "Q. Now, Miss Greenfield, I understood you to say that with respect to plaintiff's exhibit 1, being the first note that was handed to you, that in explaining this transaction that Mr. Johnson came in and he had some money to loan or invest and the note was made out and given to him? [illegible] Yes, sir. Q. Is that right? A. Yes. * * * Q. When Mr. Johnson came in the note was

made out and given to him? A. Well, he very often came in and made arrangements for the note first. He would come in one day and say that this was to be arranged for possibly a week or ten days later, and then when he came in to get the note the statement was made out. Q. You don't know whether this note - this first note that was handed to you, plaintiff's exhibit 1 - was made out the day he came in or not? A. I would say that probably it wasn't made out the day - that is, it was not made out the first time he came in." The witness further testified that defendant was president of the Monroe Securities Corporation and also president of Dovenmuehle, Inc. Upon redirect the witness testified that neither Monroe Securities Company nor Dovenmuehle, Inc., nor anyone connected with these organizations received any commissions on the transactions.

Plaintiff is a practicing lawyer. He testified that he had known the Monroe Securities Company and Dovenmuehle, Inc., "ever since their existence;" that he knew defendant; that he had had quite a few transactions with Monroe Securities Company, "firm options - and these notes here that are in controversy, I bought them all of the Monroe Securities Corporation. * * * Q. * * * From whom did you buy that (showing witness plaintiff's exhibit 1)? A. I bought it of Miss Greenfield of Monroe Securities Corporation. Q. Was Mr. Buenger there? A. He may have been. I had no personal transactions with him at all. Q. You didn't talk to him did you? A. Never, not in regard to these notes." The witness further testified that he received an invoice from Monroe Securities Corporation, owned and controlled by Dovenmuehle, Inc., for each of the notes, and that he paid for each of them with his personal check made payable to the order of Monroe Securities Corporation. The invoices and checks were introduced in evidence. The witness further testified that he bought each of the notes from "Monroe Securities Corporation, Miss Greenfield;" that he had "no dealings with Mr. Buenger at all on any

made out and given to him. [illegible] made arrangements for [illegible] and say that [illegible] days later, and then [illegible] was made out. [illegible] note that was handed to you, [illegible] the day he came in on [illegible] made out the day - [illegible] came in." The witness [illegible] dent of the Monroe Securities Corporation and [illegible] Development, Inc. Upon reviewing [illegible] Monroe Securities Company [illegible] with these organizations received [illegible]

Plaintiff in a proceeding [illegible] had known the Monroe Securities [illegible] since their existence; that [illegible] a few transactions with Monroe [illegible] and these notes [illegible] the Monroe Securities Corporation. [illegible] buy that (showing [illegible] of Miss Greenfield of Monroe Securities Corporation. [illegible] Manager there? A. He may have been, [illegible] with him at all. [illegible] not in regard to these notes." [illegible] he received an invoice from Monroe Securities Corporation, owned and controlled by Development, Inc., [illegible] he paid for each of them. [illegible] the order of Monroe Securities Corporation. [illegible] were introduced in evidence. [illegible] bought each of the notes from Monroe [illegible] Greenfield;" that he had "[illegible] Manager at all on any

of these notes;" that all of his dealings in regard to the notes were with Miss Greenfield; that he never loaned Mr. Buenger any money and the latter never asked him to loan him money. Upon cross-examination he testified that he knew Buenger and his financial responsibility but that he never talked with him at all about the notes; that prior to the transactions in question he had had similar transactions with Monroe Securities Corporation; that he does not know whether he had ever made any statement that he had no business dealings with said corporation prior to the transactions in question. The following proceedings then occurred: "Q. Mr. Johnson, did you on the 16th day of April, 1935, sign a sworn statement known as a bill of complaint in which you said in part that between the dates of December 1, 1928, and May 1, 1931, the plaintiff purchased from said Monroe Securities Corporation certain articles of agreement for warranty deed, and then further in paragraph 5 of the complaint: 'That prior to the date of the execution of the first of said optional purchase contracts plaintiff had been transacting the same nature of business with the defendant, Dovenmuehle, Inc., and when informed that these optional contracts were to be purchased by Monroe Securities Corporation the plaintiff objected and stated to said Dovenmuehle, Inc. that the said Monroe Securities Corporation was unknown to him, that he had no knowledge of its financial responsibility or its officers, and therefore plaintiff refused to transact business with said corporation.' Did you ever make that statement? * * * The Witness: I don't know what relation that question has to do with these notes in controversy. Mr. Maller (attorney for defendant): Q. Did you sign this sworn statement known as a complaint? A. I don't remember just what was in the sworn statement that I did sign. Q. But you signed the sworn statement? A. I believe - so. * * * Q. Did you read it, Mr. Johnson? A. I believe I probably read it, skipped through it. I don't know." Miss Greenfield was then called

of these notes;" that all of his dealings in regard to the notes were with Miss Greenfield; that he never loaned it, borrowed any money and the latter never asked him to loan him [illegible]. Upon cross-examination he testified that he had [illegible] financial responsibility but that he never [illegible] about the notes; that prior to the transactions in question he [illegible] transactions with Monroe [illegible] not know whether he had [illegible] dealings with said corporation prior to the [illegible] in question. The following proceedings then occurred: "Q. [illegible], did you on the 16th day of April, 1923, sign a [illegible] known as a bill of complaint in which you said in part that between the dates of December 1, 1922, and May 1, 1923, the plaintiff herein and from said Monroe Securities Corporation [illegible] agreement for warranty deed, and then further in paragraph 5 of the complaint: 'The prior to the date of the execution of the first of said optional pur-chase contracts plaintiff had been transacting [illegible] nature of business with the defendant, Governmental, Inc., [illegible] informed the these optional contracts were to be purchased by Monroe Securities Corporation the plaintiff objected and [illegible] Governmental, Inc. that the said Monroe [illegible] to him, that he had no knowledge of its financial responsibility or its officers, and therefore declined [illegible] to transact business with said corporation.' Did you ever make that statement? [illegible] The Witness: I don't know what relation [illegible] question has to do with these notes in controversy. Mr. Keller, Attorney [illegible]: Q. Did you sign this sworn statement known as a complaint? A. I don't remember just what was in the [illegible] statement [illegible] I did sign. Q. But you signed the sworn statement? A. I believe - [illegible] Q. Did you read it, Mr. Johnson? A. I believe I probably read it, skipped through it. I don't know." Miss Greenfield was then called

as a witness on behalf of plaintiff. She testified that the business of the Monroe Securities Corporation from June 1, 1927, to May 1, 1928, was selling junior mortgages, that the transactions in reference to the five notes "were special transactions," and that the said corporation was "not in that business." Counsel for plaintiff then offered to prove that there was "collateral security held by either Monroe Securities Corporation or Dovenmuehle, Incorporated, for the security of these notes," and that the security was not turned over to plaintiff, but after a colloquy between the court and counsel for both parties counsel for plaintiff made the following statement: "Mr. Donovan: These (referring to the five notes) have no collateral so far as we can see now."

Plaintiff contends that usury is never presumed and that it must be proved by a preponderance of the evidence, that plaintiff and Miss Greenfield were the only parties who testified to the transactions, that plaintiff is as credible a witness as Miss Greenfield, and therefore defendant failed to prove by a preponderance of the evidence his claim of usury. It is not the law in this state that an affirmative statement met with a flat and catagorical denial by an equally credible witness does not constitute that quantum of affirmative proof which the law requires to sustain a judgment. The preponderance of the evidence does not necessarily depend upon the number of witnesses testifying as to any material subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining where the weight or preponderance of the evidence lies, it is not necessarily determinative, and a jury or the trial court may be fully warranted in finding in favor of a party even if his case is supported by the lesser number of witnesses. It is the province of a jury or the trial court to

as a witness on behalf of plaintiff. [illegible] the business of the partnership [illegible] to May 1, 1929, was selling [illegible] in reference to the sale of the "[illegible]" [illegible] the said corporation was "not in [illegible]." Counsel for plaintiff then offered to prove [illegible] by either Romeo [illegible] for the security of these notes, [illegible] over to plaintiff, but after a colloquy [illegible] for both parties counsel for plaintiff [illegible] "Mr. Donovan: These (referring to the five notes) have no [illegible] so far as we can see now."

Plaintiff contends that [illegible] must be proved by a preponderance of the evidence, but [illegible] and Miss Greenfield were the only [illegible] transactions, that plaintiff [illegible] Greenfield, and therefore [illegible] ance of the evidence [illegible] state that an affirmative [illegible] denial by an equally credible witness [illegible] quantum of affirmative proof which [illegible] judgment. The preponderance of the evidence [illegible] depend upon the number of witnesses [illegible] subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining the weight or preponderance of the evidence this, it is not necessarily determinative and a jury or the trial court may be quite convinced in finding in favor of a party even if his case is supported by the lesser number of witnesses. It is the province of a jury or the trial court to

pass upon the credibility of the witnesses and to determine the weight, if any, that should be attached to their testimony.

"The witness' manner, demeanor and bearing upon the stand, - his replies, whether frank and open or reluctant and evasive, - his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other, - * * * are always of vital importance in determining to what, if any, credit the witness is entitled." (Ill. & St. L. R. R. & C. Co. v. Ogle, 92 Ill. 353, 362.)

It is not the law that a verdict or finding which rests alone upon the testimony of one party who is contradicted in toto by another, where both appear to be equally credible, will be set aside upon appeal. (See Eimer v. Miller, 255 Ill. App. 465, 470, and cases cited therein; Shevalier v. Seager, 121 Ill. 564, 570; Hayden v. Miller, 205 Ill. App. 147, 148; Mills & Co. v. Duke, 232 Ill. App. 277, 280.) As stated in this last mentioned case (p. 280):

"Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt, a judgment of conviction will not be reversed merely because only the complaining witness testified to the commission of the crime and he is contradicted by the defendant. (The People v. Greenberg, 302 Ill. 566; The People v. Boetcher, 298 Ill. 580; The People v. Maciejewski, 294 Ill. 390.)" (See also Ryan v. Harty, 200 Ill. App. 470; Rollins v. Kroncke, 262 Ill. App. 648 (Abst.)

In the late case of People v. Fortino, 356 Ill. 415, 420, the court said:

"This court has frequently held that the testimony of one witness, even though denied by the accused, may be sufficient to sustain a conviction. People v. Schanda, 352 Ill. 36; People v. Zurek, 277 id. 621."

However, in the instant case, plaintiff is interested in the outcome of the case: Miss Greenfield is not. In addition, there are certain facts and circumstances that satisfy us that the trial court was justified in believing the testimony of Miss Greenfield. In another action it suited plaintiff's theory of fact to have it appear that prior to December 1, 1928, a year and a half after the first transaction here involved, Monroe Securities Corporation was unknown to him; that he had no knowledge of its financial responsibility nor acquaintance with its officers, and therefore refused to do business

pose upon the credibility [illegible]

weight, if any, which should be [illegible]

"The witness' testimony [illegible] upon the stand, - his demeanor, [illegible] evasive, - his memory or [illegible] dignified and composed on the one hand, or [illegible] impertinent and [illegible] vital importance in determining [illegible] witness is entitled." (Id. [illegible] v. [illegible], 92 Ill. App. 322.)

It is not the law that a [illegible] the testimony of one party [illegible] where both appear to be equally [illegible] appeal. (See Ilgner v. [illegible] cited therein; [illegible] v. [illegible] Miller, 203 Ill. App. 167, 169; [illegible] 277, 280.) As stated in this [illegible]

"Even in a criminal case where the [illegible] the defendant's guilt beyond a reasonable [illegible] conviction will not be reversed [illegible] plaining witness [illegible] he is contradicted by the [illegible] 302 Ill. 500; The People v. [illegible] v. Nicolaiewski, 304 Ill. 108." (See also [illegible] Ill. App. 470; Allin v. Brooks, [illegible]

In the late case of People v. [illegible] the court said:

"This court has repeatedly held that the testimony of one witness, even though denied by one accused, may be sufficient to sustain a conviction. People v. [illegible] v. Burek, 377 Ill. 621."

However, in the instant case, [illegible] of the case: [illegible] facts and circumstances [illegible] justified in believing the [illegible] action is entirely plausible. [illegible] prior to December 1, 1[illegible] transaction here involved, [illegible] to him; since he had no knowledge [illegible] acquainted with its officers, [illegible] to do business

with it, and in his sworn complaint in that cause he stated alleged facts supporting that theory. In the instant suit it aids his claim to have it appear that he knew the Monroe Securities Corporation since it was organized, in 1922, and that he had been doing business with it before the transactions in question occurred. The statement of Miss Greenfield as to the manner in which plaintiff acquired each of the notes was not disputed by plaintiff. As defendant argues, this was not a case where plaintiff went into the office of Monroe Securities Corporation to purchase notes that they held, nor was it a case of the employees of that corporation showing plaintiff a note or notes, with the plaintiff having the opportunity to pick out the one he desired to purchase; that here it is undisputed that plaintiff made arrangements for a lending to be consummated in a week or ten days, that a note would then be executed in accordance with his instructions and he would give the money for the note when he thereafter came to the office. Plaintiff knew that the notes were not made by customers of the corporation, but by the president of both of the corporations. Plaintiff was a lawyer, and had invested in notes of the defendant nearly $20,000, he knew defendant well, had done business with him frequently, met him during the period of the transactions, and yet he states that he never spoke to defendant about any of the notes. Why?

Plaintiff insists that the invoices he received from Monroe Securities Corporation, the checks he gave on account of the notes, the fact that payments on the notes were made in the office of the Monroe Securities Corporation, make it plain that he purchased, at a discount, of the Monroe Securities Corporation, notes held by that corporation. In Clemens v. Crane, 234 Ill. 215, 230, the court said:

"The form of the contract is not conclusive of the question. The desire of lenders to exact more than the law permits and the willingness of borrowers to concede whatever may be demanded to obtain temporary relief from financial embarrassment have resulted

with it, and in his [illegible] plaintiff [illegible] alleged fraud supporting that theory. In the case [illegible] claim to have it appear that [illegible] since it was organized, in 1924, [illegible] been [illegible] mass with it before the transactions in question occurred. The statement of Miss Greenfield [illegible] in which [illegible] acquired each of the notes [illegible] defendant argues, [illegible] office of Monroe Securities Corporation [illegible] held, nor was it a [illegible] plaintiff's notes [illegible] to pick out the one he [illegible] puted that plaintiff [illegible] in a week or ten days, [illegible] ance with his instructions and [illegible] when he thereafter came to the office. [illegible] were not made by customers of the corporation, but by the [illegible] of both of the corporations. [illegible] in notes of the defendant [illegible] done business with him frequently, [illegible] transactions, and yet he states that he never took to [illegible] any of the notes. Why?

Plaintiff [illegible] the involved [illegible] Securities Corporation, the officer [illegible] the fact that payments on the notes were made in the office of the Monroe Securities Corporation, makes it plain that no [illegible] discount, of the Monroe Securities Corporation, notes held by that corporation. In Klemens v. [illegible], [illegible], the court said:

"The form of the contract is not conclusive of the question. The desire of lenders to exact more than the law permits and the willingness of borrowers to come [illegible] may be demanded to obtain temporary relief from financial embarrassment have resulted

in a variety of shifts and cunning devices designed to evade the law. The character of a transaction is not to be judged by the mere verbal raiment in which the parties have clothed it, but by its true character as disclosed by the whole evidence. If, when so judged, it appears to be a loan or forbearance of money for a greater rate of interest than that allowed by law, the statute is violated and its penalties incurred, no matter what device the parties may have employed to conceal the real character of their dealings. In Cooper v. Neck, 27 Ill. 301, on page 302, the court said: 'In such transaction it is the intention of the parties, not the forms employed, which fixes its character. If it were otherwise, every species of fraud, oppression and wrong might be perpetrated with perfect impunity. Hence in trials of questions of usury it has ever been held that no device intended to cover up the real character of the transaction can ever avail to defeat the statute.' It is the constant practice of courts to resort to extrinsic evidence to determine the question of usury. (2 Jones on Evidence, sec. 441; 1 Elliott on Evidence, sec. 591; Ferguson v. Sutphen, 3 Gilm. 547; Reeve v. Strawn, 14 Ill. 94.)"

In Fidelity Security Corp. v. Brugman, 137 Ore. 38, (1 Pac. (2d) 131), the court said (p. 50):

"The courts do not permit any shift or subterfuge to evade the law against usury. The form into which parties place their transaction is unimportant. Disguises are brushed aside and the law peers behind the innocent appearing cloaks in quest for the truth. Even the parol evidence rule interposes no objection: Wigmore on Evidence, sec. 2414; 39 Cyc. Usury, 1054; Terry Trading Corporation v. Barsky, 210 Cal. 428 (292 P. 474). If the transaction was, in fact, a loan of the kind denounced by the law of usury, no form to which the parties could resort for purposes of creating false appearances of innocence would be invulnerable to attack by the truth: 18 Kentucky Law Journal, 375."

In 27 R. C. L. 211, sec. 12, it is stated:

"Devices to Conceal Usury. - The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings. Every species of contrivance in the modification of any loan or contract, for the purpose of evading the statute, being cases within the mischief, are also within the remedy."

In Payne v. Newcomb, 100 Ill. 611, 618, the court said:

"There is no more familiar rule in the law than that the usury laws can not be evaded by mere pretences, shifts, or evasions.

in a variety of shifts and cunning devices designed to evade the law. The character of a transaction in question, though [illegible] mere veneer resident in which the parties were [illegible] the true character [illegible] concealed by [illegible] so judged, it [illegible] greater rate of interest than allowed by [illegible] in violated and the penalties incurred. [illegible] parties may have employed to conceal the real character of their dealings. In Carter v. Hook, [illegible] said: 'In such transaction it is the intention of the parties, not the forms employed, which [illegible] otherwise, every species of fraud, [illegible] perpetrated with security [illegible] of usury it has ever been able to devise in order to cover up the real character of the transaction and evade [illegible] the statute.' It is the [illegible] of courts to search extrinsic evidence to [illegible] on evidence, see, dal; [illegible] on Evidence, see. [illegible]; Hammond v. Dutcher, 3 Hun. 5[illegible]; Neave v. [illegible], [illegible]

In Fidelity Security Corp. v. [illegible], [illegible] ([illegible] (5[illegible]) 181), the court said (p. 5[illegible]):

"The courts do not permit any [illegible] the law against usury. The form into which parties place their transaction is unimportant. Disguises are pierced and [illegible] law peers behind the [illegible] to ascertain [illegible] truth. Even the penal evidence rule [illegible] 'Ignorance on [illegible]; [illegible]; [illegible]; [illegible] Corporation v. Dunphy, [illegible] (1[illegible]). [illegible] transaction was, in fact, a [illegible] usury, no form to which the parties could resort [illegible] creating [illegible] attack by the truth. [illegible] Journal, [illegible]

In [illegible] v. [illegible], [illegible], [illegible], [illegible]:

"Devices to conceal [illegible] - [illegible] and the willingness of borrowers to conceal [illegible] or to promise whatever may be exacted in [illegible] relief from financial embarrassment, [illegible] peoples, have resulted in great [illegible] usury laws; and to frustrate such evasion [illegible] compelled to look behind the form [illegible] substance, and have held [illegible] mere form is immaterial, [illegible] be considered. No case is to be judged by [illegible] appear to be or [illegible] transaction as disclosed by the words [illegible] it is in substance a loan or forbearance [illegible] of usurious interest for a loan or forbearance [illegible] parties the subject to the statutory [illegible] what device they may have employed to conceal [illegible] of their dealings. Every species of contrivance [illegible] of any loan or contract, for the use of money [illegible] being cases within the mischief, [illegible] within the [illegible] money."

In Jayne v. [illegible], [illegible], [illegible], the court said:

"There is no more [illegible] than the fact that the usury laws can not be evaded by mere [illegible] transactions.

This rule runs through all of the books, and requires the citation of no authority in its support."

We are satisfied that the trial court was justified in finding that the notes represented loans to defendant.

Defendant contends that "the most that can be said of the plaintiff's testimony, therefore, is that he made a loan through an agent or broker; and the law is well settled that if a person takes a note at a usurious discount from an agent or broker under such circumstances, that he knows or ought to know that the agent or broker is handling the transaction for the purpose of negotiating a loan for the maker, it is, in such a case, a loan direct to the maker of the paper through the agent or broker. And in such a case, the lender will not be permitted to hide behind the device or scheme of making the transaction appear on its face to be a purchase of the note. An examination of the cases indicates that this device to cover up a usurious lending, is really one of the most ancient devices ever put into practice." In support of this contention defendant cites a number of authorities. In 27 R. C. L. 216, sec. 17, it is said:

"Where the first negotiation of paper is an exchange of it for money at a usurious rate of discount to one who knows the paper had no prior inception, the transaction is commonly considered usurious, as it is a loan, and not a sale."

In 2 Daniel on Negotiable Instruments (7th ed.) 900, the author states:

"General rule as to usury in negotiation of the instrument.- Hence this rule may be laid down: if no party prior to the holder could himself bring an action upon the note, and the holder knew that fact at the time he received it, then no prior party owned, or seemed to own it, and the holder who is the first owner must be taken to have loaned the money to the maker."

In Fidelity Security Corp. v. Brugman, supra, the court said (p. 50):

"Where the first negotiation of a promissory note is an exchange of it for money at a usurious rate of 'discount,' to one who knows the instrument had not acquired validity by a previous transfer for value from maker to payee, the transaction is considered a usurious loan, and not a sale: Bjorkman v. Columbia Wrecking & Fuel Co., 130 Or. 189 (279 P. 633); Webb on Usury, Sec. 155; 27 R. C. L. Usury, p. 216, sec. 17; and 39 Cyc. Usury, 935."

This rule [illegible] obtention of no authority in its agency."

We are satisfied that the trial court was [illegible] in finding that the notes represented loans [illegible].

Defendant contends that "[illegible] of the plaintiff's testimony, [illegible], if he made a loan through an agent or broker; and the law is well settled that if a person takes a note at a usurious discount from an agent or broker under such circumstances, [illegible] knowing or ought to know that the agent or broker is handling the transaction for [illegible] of negotiating a loan for the maker, it is, in [illegible], a loan [illegible] to the maker of the paper through the agent or broker. [illegible] the lender will not be permitted [illegible] of making the transaction [illegible] note. An examination of the [illegible] cover up a usurious lending, [illegible] devices over put into [illegible] defendant cites a number of [illegible] 17, it is said:

"Where the first negotiation of a [illegible] it for money at a usurious rate of discount to one who knows the paper had no prior inception, the [illegible] usurious-ness, as it is a loan, [illegible] not a loan.

In 2 Daniel on negotiable instruments [illegible], the author states:

"General rule is to apply in a [illegible] Hence this rule may be laid down: [illegible] could himself bring an action upon the note, [illegible] that fact at the time he received it, [illegible] or assisted to own it, and the holder [illegible] taken to have loaned the money to the maker."

In Fidelity Security Corp. v. [illegible], [illegible], the court said (p. [illegible]):

"Where the first negotiation of a promissory note is an exchange of it for money [illegible] to one who knows the instrument has not [illegible] by fidelity [illegible] previous transfer for value [illegible] usurious loan, [illegible] Bergman v. Columbia Trading & Trust Co., 130 Or. 152 (299 P. 8[illegible]); [illegible] Ky. 7 R. C. L. Usury, p. 216, sec. 17; and [illegible] Co. Usury, 518."

In Sylvester v. Swan, 87 Mass. 134, the court said:

"The transaction proved at the trial, by which the note in suit was negotiated to the person who received it as the first holder for value, was in legal effect equivalent to a delivery of the note by the promisor directly from his own hands, in consideration of the money advanced to him therefor. It was a loan of money to the defendant on the note. The fact that the money was obtained through an agent of the defendant does not in any degree change or affect the legal character which attaches to the dealings of the parties. Until the note was negotiated by the defendant's agent, it did not become a binding and operative contract, upon which the promisor could be held liable. It was the delivery of the note to the first holder, in consideration of the money which he lent upon it, which made the defendant for the first time chargeable on his promise. It was not, therefore, in any sense a purchase of a note in the market which had been previously put in circulation." (See also Richardson v. Scobee, 49 Ky. 12.)

The principle of law stated by these authorities applies to the facts of the instant case, where it appears that plaintiff knew that the note had no prior valid inception and knew or should have known that the sole purpose of the existence of the note was that it be transferred to him for the purpose of raising money for the maker. After a careful consideration of all the facts and circumstances we have reached the conclusion that the finding of the trial court that the transactions involved loans to defendant is fully justified by the proof.

Plaintiff contends that "where a defendant fails to testify to facts within his knowledge the presumption is that his testimony would be favorable to plaintiff," and argues that the failure of defendant to testify raised a presumption that if he had been called as a witness his testimony would have supported the theory of plaintiff. We find no merit in this contention. Both parties agreed that all of the transactions took place between plaintiff and Miss Greenfield. Plaintiff stated repeatedly that he never had any conversations or dealings with defendant in reference to the notes. The rule contended for is subject to certain limitations and is not applicable to the instant case. In Belding v. Belding, 358 Ill. 216, 220, the court states the rule as follows:

In Sylvester v. Lyon, 87 Iowa, 126, the court held:

> "The transaction proved in the suit, by which the note in suit was negotiated to the plaintiff, [illegible] a bona fide holder for value, was in fact three equity [illegible] to a delivery of the note by the [illegible] in consideration of the money by [illegible] to him therefor. It was a loan of money to the [illegible] on the note. [illegible] money was obtained through an agent or the defendant does not in any degree change or affect the legal character [illegible] to the dealings of the parties. Until the note was [illegible] by the defendant's agent, it did not become a binding and operative contract, upon which the promisor could be held liable. It was the delivery of the note to the [illegible] holder, in consideration of the money which he lent upon it, which made the [illegible] for the first time enforceable in his [illegible]. [illegible], in any sense a purchase of a note in the market which had been previously put in circulation." [illegible] v. [illegible], [illegible] Xy. 12.)

The principle of law stated by these authorities applies to the facts of the instant case, where it appears that plaintiff knew that the note had no prior valid inception and knew or should have known that the sole purpose of the existence of the note [illegible] was to be transferred to him for the purpose of [illegible] to [illegible]. After a careful consideration of all the facts [illegible] we have reached the conclusion that the finding of the trial court [illegible] the transactions involved loans to defendant is [illegible] by the proof.

Plaintiff contends that "where a [illegible] fails to testify to facts within his knowledge the presumption [illegible] that his testimony would be favorable to plaintiff," and [illegible] that the failure of defendant to testify raised a presumption that if he had been called as a witness his testimony would have supported the contention of plaintiff. We find no merit in this contention. [illegible] agreed that all of the transactions took place between [illegible] and Hanagreenfield. Plaintiff stated repeatedly that he [illegible] any conversations or dealings with defendant in regard to the notes. The rule contended for is subject to certain limitations and is not applicable to the instant case. In Bolding v. Dalton, 68 Ill. 112, 220, the court states the rule as follows:

"It is a rule well recognized, that where the evidence to prove a fact is chiefly, if not entirely, in control of the adverse party and such evidence is not produced, his failure to produce the evidence tends to strengthen the probative force of the evidence given to establish such claimed fact. (Morris v. Equitable Life Assurance Society of United States, 109 Neb. 348, 191 N. W. 190.) The burden of producing evidence, chiefly, if not entirely, within the control of an adverse party, rests upon such party if he would deny the existence of claimed facts. (Harper v. Fay Livery Co., 264 Ill. 459.) Where a party alone possesses information concerning a disputed issue of fact and fails to bring forward that information, and it is shown that it can be produced by him alone, a presumption arises in favor of his adversary's claim of fact. (Great Western Railroad Co. v. Bacon, 30 Ill. 347.)" (Italics ours.)

Plaintiff argues that defendant might have testified as to his dealings with Monroe Securities Corporation. Had he attempted to do so plaintiff would have had the right to interpose the objection that such dealings were unknown to him and not binding upon him.

In the instant case during the examination of plaintiff by his counsel the following occurred: "When you made these loans did you have any intention of doing business with Mr. Buenger? Mr. Perel (attorney for defendant): I object. The Court: Sustained." Plaintiff contends that the court erred in sustaining the objection to this question, and cites in support of his contention Chicago Title & Trust Co. v. Kearney, 282 Ill. App. 279, 286, where it is stated:

"The courts of this State have held that in the last analysis the question of whether a contract is tainted with usury is determined not by the form of the contract employed but by the intention of the parties."

The court in that case undoubtedly stated the correct principle of law, but the intention of the parties is to be determined from the facts and circumstances of the case. (See Clemens v. Crane, supra, p. 229.) As well might plaintiff argue that defendant, had he taken the stand, might have testified to his intent in the transaction. Of course, in a criminal case, where the intent is of the essence of the offense, the defendant has the right to testify to what his intention was in the commission of the act with which he

"It is a rule well recognized, that when the evidence to prove a fact is chiefly in the possession, or control of the adverse party and such evidence is not produced, his failure to produce the evidence tends to strengthen the presumptive force of the evidence given to establish such claimed fact. (Morris v. Monticello Life Insurance Co., 6 Ill. App. 3d 1, 4, 284 N.E.2d 1, 3 (1st Dist. 1971). The burden of producing evidence, chiefly, if not entirely, within the control of an adverse party, rests upon such party if he would deny the existence of claimed facts. (Harper v. Sky Livery Co., 20 Ill. App. 3d 1, 4, 312 N.E.2d 1, 3 (1st Dist. 1974). Where a party [illegible] possesses information concerning a disputed issue of fact and fails to bring forward that information, it is in effect an admission that such evidence would be unfavorable to him and not, binding upon him. v. Bacon, 30 Ill. App. 3d 1, 4, 332 N.E.2d 1, 3 (1st Dist. 1975).)" (Italics ours.)

Plaintiff argues that defendants might have testified as to his dealings with Monroe Commodities Corporation. But he attempted to do so plaintiff would have had the right to interpose the objection that such dealings were unknown to him and not binding upon him.

In the instant case, during the examination of plaintiff by his counsel the following occurred: [illegible] did you have any intention of doing anything [illegible] Mr. Perel (attorney for defendant): I object. [illegible] sustained." Plaintiff contends that the court erred in sustaining the objection to this question, and cites in support of his contention Chicago Title & Trust [illegible] v. Kaplan, [illegible] 2d 1, 27, 286, where it is stated:

> "The course of this [illegible] in the last analysis the question of whether a contract is tainted with usury is determined not by the [illegible] of the contract on [illegible] but by the intention of the parties."

The court in that case [illegible] the rule of law, but the intention of the parties is [illegible] from the facts and circumstances of the case. (Id. Illinois [illegible], supra, p. 289.) As well might plaintiff argue that [illegible], had he taken the stand, might have [illegible] to his [illegible] in the transaction. Of course, in a criminal case, [illegible] in the absence of the offense, the [illegible] to what his intention was in the commission of the act with which he

is charged. The cases cited by plaintiff are not applicable to the facts of the instant case.

Plaintiff contends that the court permitted defendant to impeach plaintiff upon an immaterial matter. This contention has reference to the matter of the sworn bill of complaint filed in the Circuit court of Cook county in Johnson v. Dovenmuehle, Inc. We find no merit in this contention and what we have heretofore said in reference to that evidence covers the instant contention.

Plaintiff contends that there is a variance between the allegations in defendant's petition and the proof. It is sufficient to say, in answer to this contention, that the question of the alleged variance was never pointed out or raised during the trial of the cause and cannot be asserted for the first time in this court. It is apparent that this contention is an afterthought, as plaintiff, at the conclusion of defendant's evidence, made no motion for a finding in his favor on the ground that defendant had not made out a prima facie case. On the contrary, it appears that plaintiff considered that a prima facie case had been made, and introduced evidence to rebut defendant's proof as to the alleged usury.

Plaintiff has had a fair trial and the judgment of the Municipal court of Chicago should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

is charged. The cases cited by plaintiff [illegible] to the facts of the instant case.

Plaintiff contends that the court [illegible] to impose plaintiff upon an immaterial matter. [illegible] reference to the matter of the motion filed in [illegible] in the Circuit court of Cook county in Johnson v. [illegible]. We find no merit in this contention and [illegible] said in reference to the evidence given [illegible].

Plaintiff contends that there is a variance between the allegations in defendant's petition and the proof. It is sufficient to say, in answer to this contention, that the [illegible] of the alleged variance was never pointed out or raised during the trial of the cause and cannot be asserted for the first time in this court. It is apparent that this contention is an afterthought, as plaintiff, at the conclusion of [illegible], made no motion for a finding in his favor on the [illegible] not made out a prima facie case. [illegible] that plaintiff considered that a prima facie [illegible] and introduced evidence to rebut defendant's [illegible] the alleged usury.

Plaintiff has had a fair trial and the judgment of the Municipal court of Chicago should be and is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

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38291

ESTHER SAMUEL,
Appellee,

v.

JACOB SAMUEL,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

285 I.A. 593

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Esther Samuel, complainant herein, filed a bill against defendant for separate maintenance and on November 27, 1934, procured a decree from which no appeal was prosecuted. The decree provided for a reference to a master in chancery to take proofs and report his conclusions as to the amount of money defendant was to pay for the maintenance and support of complainant and of their minor child, whose custody was awarded to complainant; to fix the amount of costs of suit, stenographer's and solicitors' fees; to determine the back alimony due under the former order of court, the expenses of the transcript of evidence, court reporters' and master's fees to be paid by defendant. The decree also provided that during the pendency of the proceedings before the master, defendant was to pay complainant $25 a week on account of her support and maintenance and that of their child, as well as $150 as fees for complainant's solicitors, but that " by the allowance of said alimony and solicitors' fees, the court does not by said order indicate in any manner the amount that should be allowed permanently in the above entitled cause." The master recommended permanent alimony of $35 a week, effective from the date of the reference, solicitors' fees of $750, found that the unpaid alimony under a prior order amounted to

38201

ESTHER [illegible],

Appellee,

v.

JACOB SAMUEL,

Appellant.

201 IA. 539

MR. JUSTICE [illegible] delivered the opinion of the court:

[illegible] defendant for expense in maintenance and on [illegible], [illegible] procured a decree from which he appeals [illegible] provided for a reference to a master in chancery to [illegible] and report his findings [illegible] to the income of [illegible] to pay for the maintenance [illegible] of children and of their minor child, those are only [illegible] to consider [illegible] amount of costs of suit, stenographer's and solicitors' fees; [illegible] determine the back alimony [illegible] the expenses of the transcript [illegible] master's fees to be paid by [illegible] that during the pendency of the proceedings [illegible] defendant was to pay court [illegible] and maintenance and [illegible] complainant's solicitors, but [illegible] and solicitors' fees, [illegible] manner the amount that should be [illegible] entitled cause." [illegible] a week, effective from [illegible] of $750, found that the unpaid alimony [illegible] amounted t

$559, and recommended that it be paid, fixed the master's charges at $768.02, reporter's costs at $492 and complainant's costs at $44.30. Exceptions filed to the master's report were overruled and a supplemental decree was entered in accordance with the recommendations of the master, except that the solicitors' fees were reduced from $750 to $500 and the master's fees were reduced to $400. Defendant appeals from the supplemental decree thus entered.

The parties were married November 9, 1930, and lived together until July 28, 1932. One child was born of their marriage. Complainant had been a school teacher in Chicago prior to her marriage, and had no income or property of any nature. Defendant is a physician and surgeon of some fifteen years experience, with an office located at 91st street and Commercial avenue, in South Chicago.

Numerous points are raised by counsel for both sides relating to questions of fact and law applicable to a voluminous record of more than 800 pages. The ultimate question in controversy, however, is whether the circumstances of the parties and defendant's income from his profession and otherwise warranted the chancellor in decreeing that defendant pay the various sums recommended by the master for permanent alimony, back alimony, solicitors' fees, master's fees, reporters' charges and costs of suit.

Complainant testified that shortly after her marriage she assisted defendant at his office four or five days a week, kept a record of the patients who did not pay cash for services rendered them, and sent out statements at the end of each month; that day by day she and defendant went over the entire list of calls made by defendant to ascertain which of his patients had paid, and that the names of those who did not pay were placed on cards; that the aggregate cash receipts from patients amounted to $40 or $50 a

$859, and recommended that [illegible] the charges at $768.02, reporter's costs [illegible] at $44.30. Exceptions filed to the [illegible] and a supplemental decree [illegible] in [illegible] tions of the master, except [illegible] reduced from $750 to $300 and [illegible] and appeals from the supplemental [illegible].

The parties were [illegible] together until July 28, 1922. [illegible] Complainant had been a school teacher in [illegible] marriage, and had no income or property [illegible] is a physician and surgeon of some [illegible] an office located at 61st street and [illegible] Chicago.

Numerous points are raised by counsel [illegible] lating to questions of fact and [illegible] of more than 800 pages. The ultimate question [illegible] over, is whether the circumstances of the [illegible] income from his profession and otherwise [illegible] decreeing that defendant pay the various [illegible] master for permanent alimony, back alimony, [illegible] master's fees, reporters' charges and costs of suit.

Complainant testified [illegible] defendant at his office for [illegible] a record of the patients who did not pay cash for [illegible] them, and sent out statements [illegible] by day by the and defendant [illegible] by defendant to account which of his patients had paid, and the names of those who did not pay were placed on credit; and the aggregate cash receipts from patients [illegible] $ 1,[illegible] or $50 a

day, exclusive of the charges that were entered on the card records; that her assistance to defendant continued from November, 1930, until shortly before the baby was born in March, 1932. She testified further that prior to the birth of their child defendant gave her $35 each week to cover food, clothing, help and incidentals, and after the birth of the child this sum was increased to $50 a week, out of which she paid the same expenses; that during this period defendant paid $70 to $75 a month for the rent of their home, in addition to his office rent, expenses, insurance and other necessaries, which amounted in the aggregate to about $1,125 a month, including what he was paying to the banks and for installments on an automobile purchased during that period for $1,000.

It appears from the evidence that defendant engagedin the purchase and sale of various securities since 1921, and carried accounts with four different brokerage offices and two banks during the ensuing period and until about 1933. The record contains numerous exhibits showing statements from the banks and brokerage houses with which he dealt, indicating that up to 1929, the peak years, his accounts ran into many thousand of dollars and continued in lesser amounts for several years thereafter. Through these transactions defendant undoubtedly made substantial profits.

William E. Schumacher, a witness caled by complainant, testified from the records of the South Chicago Savings Bank, where defendant maintained an account, that during the year 1931 defendant paid the bank in cash $1,715.90, and complainant contends that this sum was derived from defendant's earnings in his profession during that year. Harry J. Rolewicz, another witness, testified that he had charge of the records of the Union State Bank of South Chicago, and by stipulation of counsel it was agreed that defendant paid in cash and not for the sale of collateral $5,600 during 1931, which

day, exclusive of [illegible]
records; that her [illegible] Commonwealth,
1930, until March [illegible]
testified further that [illegible]
gave her $35 each week [illegible]
and after the birth of [illegible]
week, out of which [illegible]
period defendant [illegible]
home, in addition [illegible]
necessaries, which amount [illegible]
including what he was paying [illegible]
automobile purchased [illegible]

It appears from the [illegible] engaged in the
purchase and sale of [illegible]
accounts with [illegible]
the ensuing period and until [illegible]
numerous exhibits [illegible]
houses with which [illegible] 1929,
years, his accounts [illegible]
in lesser amounts [illegible]
transactions defendant [illegible]

William W. Commodore, [illegible]
testified from the record [illegible]
defendant maintained [illegible]
paid the bank in cash [illegible]
sum was derived from defendant [illegible]
that year. Harry J. Holmes, [illegible]
had charge of the records of the union [illegible]
and by stipulation of counsel [illegible]
cash and not for the sale of [illegible]

complainant also contends was taken from his professional earnings during that period. The aggregate amount thus shown to have been paid by defendant to the two banks in 1931 was $7,315.99, or an average of $609.66 a month. In addition to this sum, defendant's monthly outlay for cash, during that period, according to complainant's testimony, was $150 for their home expenses, including food, clothing and incidentals, $90 rental for their apartment and garage, $156 for office expenses, $20 a month for laundry, gas, electric light and telephone, and $100 a month on account of the purchase of a new Buick automobile. The total monthly outlay during 1931, including the sums paid to the two banks, approximated $1,125. Complainant testified that defendant's income was more than $1,200 a month, and the foregoing items of expense incurred during the year 1931 were introduced in evidence to sustain her conclusion which was based on information acquired by her while assisting defendant at his office, indicating, as she testified, weekly cash receipts of from $250 to $350.

Defendant by way of defense produced record cards tending to show that during the twenty-three months preceding the hearing before the master his income, derived entirely from the practice of medicine, amounted to the gross sum of $5,618.21; that his total overhead for professional practice, including insurance premiums during that same period, amounted to $2,469.90, leaving a net income of $3,148.31, or a monthly average of $136.88. It is argued that in no event should the reasonable payments for alimony to support complainant and her child exceed one-third to one-half of defendant's income, and that in the light of defendant's testimony the amounts fixed by the supplemental decree are so inequitable as to warrant a reversal thereof.

Defendant denies that he gave his wife an allowance of $35 a week prior to the birth of their child and that he increased the

complainant also [illegible] during that period. [illegible] have been paid by defendant to the [illegible] in 1931 [illegible], or an average of $809.66 a month. In addition [illegible] furnished monthly quality for [illegible] to complainant's testimony, [illegible] clothing and incidentals, $50 [illegible] $150 for office expense, $20 [illegible] light and telephone, and [illegible] a new Buick automobile. The total monthly outlay during 1931, including the sums paid to [illegible] complainant testified that [illegible] month, and the foregoing [illegible] 1931 were into need in evidence [illegible] based on information [illegible] his office, [illegible] from $250 to $350.

Defendant by way of [illegible] to show that during the [illegible] before the master his income, derived [illegible] of medicine, amounted to [illegible] overhead for professional [illegible] during that same period, [illegible] come of $3,168.51, [illegible] that in no event should [illegible] complainant and her child exceed [illegible] income, and that in the light of [illegible] fixed by the supplemental decree [illegible] reversal thereof.

Defendant denies that he [illegible] in income of $50 a week prior to the birth of [illegible] child and that he increased the

allowance to $50 a week after the child was born. He stated that his office rent at the time of the hearing was $27.50 a month, having been reduced from $35; that he had no assistant in his office, and a dentist next door answered his telephone and took his calls when he was out; that his clientele is made up principally of the laboring class, from the steel mill district, many of whom were out of work and were unable to pay their obligations; that his office hours were from two to five o'clock in the afternoon, and from seven to nine in the evening, in addition to which he made calls during other hours of the day and used the Buick car, purchased in April, 1931, for that purpose; that his garage rent was $8 a month, that he carried life insurance to the extent of $5,000; and he denied that his practice had at any time amounted to $40 or $50 a day. He testified further that he kept a daily cash book, beginning in January, 1933, wherein he entered from day to day his cash receipts, and this book was introduced in evidence. In addition thereto he also produced his card record system, giving the names of patients, the amounts of the charges and the payments made from time to time. To supplement his cash book and card system, defendant prepared a summary in which he set forth, month by month, for the period of twenty-three months preceding the hearing, his receipts, office expenses, insurance premiums and his net income, from which it appears that for these twenty-three months his net income amounted to $3,148.31, or an average monthly income of $138.88. Defendant kept no record of his disbursements, other than cancelled checks and receipted bills.

The income sheets produced by defendant were, according to his own testimony, made up from the record cards which were kept in his desk. He stated that prior to 1933 he failed to put down the year on his card record, and was "kind of careless. I didn't think it was necessary," but that in 1933 he changed his plan and began

allowance to $80 a week [illegible] to [illegible] [illegible]
his office rent at the time of the [illegible] [illegible], [illegible]-
ing been reduced from $55; that [illegible] [illegible],
and a dentist next door [illegible] [illegible]
when he was out; that [illegible] [illegible] [illegible] of the
laboring class, from [illegible] [illegible]
of work and were unable to pay [illegible] [illegible]
hours were from two to five o'clock [illegible] afternoon, and from
seven to nine in the evening; [illegible] [illegible]
during other hours of the day he was [illegible] out; [illegible] in
April, 1931, for that purpose [illegible] [illegible] months,
that he carried life insurance to the amount of [illegible]
denied that his practice had [illegible] [illegible]
day. He testified further [illegible] book, [illegible]
in January, 1932, wherein he [illegible] [illegible]-
ceipts, and this book was introduced in evidence. [illegible]
thereto he also produced his [illegible]
of patients, the amounts of [illegible] [illegible]
time to time. To supplement [illegible] book [illegible]
and prepared a summary in [illegible] [illegible]
the period of twenty-three months [illegible]
ceipts, office expenses, [illegible] [illegible]
which it appears that for [illegible] [illegible]
amounted to $3,140.23, [illegible]
Defendant kept no record [illegible] disbursed it, [illegible]
checks and receipted bills.

The income [illegible] according to
his own testimony, [illegible] from the [illegible] kept in
his desk. He stated [illegible] to put down the
year on his card record, and [illegible] [illegible]
it was necessary," but that in 1929 he changed his plan and began

noting the year during which the services were rendered and payments made. To support his testimony defendant produced one John Springer, who testified that he had been engaged by defendant to examine the cards and if possible to bring some order out of chaos. Springer testified that there were approximately 1,000 cards, and that more than one-half of them were not dated, that "from the age of the cards they might have gone back ten or fifteen years. I could not determine that." The master found that defendant's records were incomplete and incorrect, and that "no complete set of books was kept by defendant." This is borne out by Springer's testimony, who merely summarized defendant's receipts as indicated by the card records from July 1, 1933, down to December 1, 1934, and stated on cross-examination that he found errors in defendant's computations, indicating that items aggregating $331.50 had not been included in his total and that items amounting to $81 had erroneously been duplicated in the list prepared by defendant. For the period covered by Springer's examination, defendant's cash receipts amounted to approximately $3,700, but no satisfactory showing is made as to charges other than cash derived from his practice. It is solely from this evidence that defendant concludes that his average monthly income during the period of twenty-three months preceding the hearing was $136.88.

Complainant's counsel sought to impeach defendant's testimony by showing that in April, 1933, a petition was pending before the court requiring defendant to show cause why he should not be attached for contempt for failure to pay alimony under the court's order, and that defendant then filed his sworn petition praying for a reduction in alimony; that in his answer to the rule defendant stated that "his average income at the present time from all sources is approximately $125 gross per month," and in his petition for reduction of alimony he made the same statement. Upon the hearing

noting the year ending [illegible] to [illegible] -y-
mente made. To [illegible] one
John Springer, who [illegible]
to examine the cards [illegible]
chase. Springer [illegible]
cards, and that no [illegible]
"from the age o[illegible] fifteen
years. I could not determine [illegible]
ant's records were incomplete [illegible]
set of books was kept by [illegible] by Springer,
testimony, who merely [illegible] by
the card records from [illegible]
states on cross-examination [illegible]
computations, into the [illegible]
included in his total [illegible]
been duplicated in the first [illegible]
covered by Springer's examination [illegible]
to approximately [illegible], but no [illegible]
changes other than [illegible] derived [illegible]
this evidence that defendant [illegible]
come during the period of [illegible]
was $126.88.

Complainant's counsel [illegible]
mony by showing that in [illegible]
the court requiring [illegible]
attorney for contempt [illegible]
order, and that defendant [illegible] sworn [illegible]
a reduction in alimony; [illegible]
stated that this average income [illegible]
is approximately $125 gross per month; [illegible] for
reduction of alimony he made the same statement. Upon the hearing

before the master, defendant admitted these statements were untrue, and sought to explain them by saying that "it ought to have been $125 net. I think I was mistaken." The period covered by defendant's answer to the rule and his petition included the months of April and June, 1933. It appears from the record that during April of that year defendant's income was as follows: Cash receipts, $90.25; card index, $156.50; received from Noyes & Co. (brokers) $571.89, - making a total of $818.64. His expenses for that month were $159.81, leaving a net income of $658.83, instead of $125 gross, as was stated in his verified pleading. During the month of June, 1933, defendant's cash account shows receipts of $98.50, income as shown by his card index of $132, making a total of $230.50, as against an expense item of $67.85, showing a net income for that month of $162.65, not including sums derived from sales and trading in securities during that period.

In addition to the income from his profession and profits made through the purchase and sale of securities, the evidence discloses that defendant received a one-third interest in the estate of his father, which was probated prior to the hearing before the master. There is evidence indicating that subsequent to his father's death defendant transferred real estate and securities to other members of his family, and made payments to his mother which he stated were on account of advances made to him by both his mother and father, and for board due and owing to his mother after he had become separated from complainant. Many of these transactions were negotiated through defendant's brother, who kept notebook memoranda thereof and testified with reference thereto. The record is replete with contradictions as to these transactions, however, and it is difficult at best to trace the various items paid back and forth between the members of the family as shown by the notations in the

before the master, defendant [illegible] transfers were au-
thus, and sought to exclude them [illegible] on the ground to have
been [illegible] not. I think [illegible] - [illegible] - [illegible] by
defendant's answer to [illegible] the months
of April and June, 1932. [illegible] re [illegible]
pril of that year defendant's income [illegible]
($90,65; and in May, [illegible]
$571.65), - making a total [illegible]
were ($189.81), leaving [illegible]
gross, as [illegible] in his [illegible]
June, 1932, defendant's [illegible] shows [illegible] in-
come as shown by his own [illegible] ($[illegible].5?),
as against an expense item of [illegible] for
month of ($82.85), not including [illegible] on [illegible]
in accounting for that [illegible].

In addition to the income [illegible] ion [illegible]
made through the purchase and sale of a [illegible] , the [illegible] -
clusas that defendant [illegible] on-[illegible] interest in the [illegible]
of his father, which [illegible] [illegible] ing [illegible]
master. There is evidence in [illegible] that [illegible]
death defendant [illegible]
members of his family, [illegible] which he
stated were on account [illegible] the mother
and father, and for [illegible] had
become separated from [illegible]. Many of [illegible] transactions were
negotiated through defendant's broker, [illegible]
thereof and testified [illegible] [illegible]
with contradictions as to these transactions, [illegible] it is
difficult at best to trace the various [illegible] back and forth
between the members of the family as shown by the notations in the

memorandum book and as testified to by defendant and his brother.

While conceding that defendant dealt extensively in securities during a long period of time, both before and after his marriage, running into vast sums of money, and that during the year 1931 he paid to the two banks hereinbefore mentioned sums aggregating $7,315.90, in addition to the expenses of his household and office, insurance premiums and installments on his automobile, which, based upon the most reasonable estimates, exceeded a monthly average during 1931 of $1,000, it is argued that this evidence is immaterial to defendant's earnings and income as of the time of the hearing before the master. While it may be true that defendant's income from both his professional practice and other sources may have decreased subsequent to 1932, when the parties separated, the evidence throws some light on the station in life of the parties during the time they lived together as husband and wife and it certainly tends to corroborate the testimony of complainant as to his income from professional sources at an earlier period and to afford a guide as to the relative credibility of the parties. While the master's findings are not conclusive and may be reviewed, we think that a careful examination of the record, upon the salient question as to whether or not defendant had a sufficient income at the time of the hearing before the master to justify the charges contained in the supplemental decree, leads to the conclusion that the evidence abundantly sustains complainant's contention that the sums fixed by the supplemental decree were reasonable and in keeping with defendant's income from his profession. His contention that he had a net monthly income of only $136 for the twenty-three months ending in December, 1934, is not sustained by the evidence. It was incumbent upon the master to determine the credibility of the various witnesses, including the parties to this proceeding, and if he found in the testimony of defendant such discrepancies as would justify him in concluding that defendant's testimony was not reliable, and that he

memorandum book and as identified by [illegible] in his testimony.

While concerning that statement, [illegible] living [illegible] securities during a long period of time, [illegible] after his marriage, during his [illegible] the year 1931 he paid to the [illegible] amounts aggregating $[illegible]. In addition [illegible] and office, insurance premiums and [illegible] tion, based upon the best [illegible] average during 1931 [illegible] immaterial to defendant's [illegible] bearing before the master. While [illegible] income from both his professional practice [illegible] have decreased subsequent to 1931, [illegible] evidence throws some light on [illegible] during the time they lived together [illegible] tainly tends to corroborate the testimony [illegible] income from professional services [illegible] a guide as to the relative availability of the [illegible] master's findings are not conclusive on [illegible] that a careful examination of the record, [illegible] as to whether or not defendant [illegible] of the hearing before the master [illegible] the supplemental record, [illegible] abundantly sustains defendant's contention [illegible] the supplemental record [illegible] and's income from his professional [illegible] monthly income of only $[illegible] December, 1931, is not [illegible] upon the master to determine [illegible] including the parties to this proceeding, [illegible] mony of defendant such discrepancies [illegible] cluding that defendant's testimony was not reliable, and that he

sought, unsuccessfully, to minimize his earnings and assets during the period in question, the master was justified in placing greater reliance on the evidence adduced by complainant and in making the recommendations adopted by the court and incorporated in its decree.

Defendant also questions the solicitors' fees allowed complainant and the master's charges. We have carefully examined these items, and so far as the master's charges are concerned we find them reasonable. It is urged that in computing solicitors' fees the master and court allowed complainant's solicitors to include services rendered in the probate court. We think the services were necessary. The proceedings in the probate court were had during the period in which the separate maintenance suit was pending, and the services rendered by complainant's solicitors were calculated to discover and develop assets belonging to defendant, and were properly included in the award. After a careful examination of the entire record, we are satisfied that the supplemental decree is based upon sufficient evidence and that there are no convincing errors for reversal. Therefore the decree is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

sought, unnecessarily, to [illegible] during the period in question, the [illegible] reliance on the evidence is made by [illegible] recommendations adopted by the court in [illegible] case.

Defendant also [illegible] plaintiff and the master's energies. [illegible] these items, and so far as the master's charges [illegible] find them reasonable. It is urged that in [illegible] fees the master and counsel allowed [illegible] include services rendered in the probate [illegible] were necessary. The proceedings in the [illegible] during the period in which the [illegible] and the services rendered by [illegible] to discover and develop assets belonging [illegible] properly included in the estate. [illegible] entire record, we [illegible] based upon sufficient evidence [illegible] errors for reversal. [illegible] the decree [illegible].

[illegible]

[illegible]ucanian, P. J., and [illegible], J., concur.

38325

IN THE MATTER OF THE ESTATE OF
EUGENIA CRIMP BRIDGE, DECEASED.

THE FIRST NATIONAL BANK OF
CHICAGO, executor,
Appellant,

v.

WALTER CRIMP, ALFRED CRIMP and
BESSIE CRIMP HARVEY, claimants,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

285 I.A. 594

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Eugenia Crimp Bridge, the testatrix, died January 20, 1929. Her estate was probated and letters testamentary issued to the First Union Trust & Savings Bank. December 3, 1929, Walter Crimp, Alfred Crimp and Bessie Crimp Harvey filed their claim against the estate, and upon hearing before the probate court the claim was allowed on June 21, 1930, for $57,473.53. From this order the executor prosecuted an appeal to the circuit court, where the claim was allowed December 19, 1930, for $31,516.74. Thereafter claimants appealed to the appellate court where, on November 24, 1931, judgment was entered allowing the claim for $58,945.19. The executor thereupon appealed to the Supreme court, where the judgment of the appellate court was affirmed at the February term, 1933, and rehearing denied at the subsequent term of court. While claimants were taking steps in the probate court to enforce the payment of the claim, the executor, on October 23, 1933, which was four years and nine months after the death of the testatrix and more than three

38325

IN THE MATTER OF THE [illegible] OF
[illegible] CRIME [illegible],

THE FIRST NATIONAL BANK [illegible]
CHICAGO, executor,
appellant,

v.

WALTER CRIMP, [illegible] and
BESSIE CRIMP KEVEY, claimants,
appellees.

MR. JUSTICE WHITE [illegible] delivered [illegible]

Eugenia Crimp Kelge, the [illegible], died [illegible]. Her estate was probated in Illinois [illegible] the First Union Trust & Savings Bank, [illegible] executor [illegible]. Fired Crimp and Bessie [illegible] and upon hearing before the probate court [illegible] June 21, 1930, for [illegible] presented an appeal to the [illegible] allowed December 15, 1930, for [illegible] appealed to the [illegible] ment was entered affirming the [illegible] thereupon appealed to the [illegible] appellate court [illegible] ing denied at the subsequent [illegible] taking steps in the probate [illegible] claim, the executor, on October [illegible] nine months after the death of the [illegible] three

years after the original allowance of the claim in the probate court, presented to the probate court "a petition for leave to file a petition in the nature of a bill of review to review the allowance of the claim of Walter Crimp, Alfred Crimp and Bessie Crimp Harvey." To this document was attached what is designated as a "petition in the nature of a bill of review to review the allowance of the claim of Walter Crimp, Alfred Crimp and Bessie Crimp Harvey," which included the affidavits of Frank H. McCulloch and James H. Cartwright. The probate court denied the executor the right to file the petition, and upon appeal to the circuit court a like order was entered, from which the executor now prosecutes this appeal.

The claim in the probate court was for money collected by Eugenia Crimp Bridge, testatrix, as trustee for claimants under an agreement dated December 29, 1893, made by her in her own right and as executrix of the estate of William G. Crimp, father of claimants, and Ezekiel Smith and Joseph Eastman. The claimants took the position that all knowledge of the trust agreement and the moneys paid thereunder was fraudulently withheld and concealed from them by the testatrix, and that no knowledge of the contract or the moneys thus paid ever came to them until after the testatrix's death in January, 1929.

The executor's petition is a voluminous document, appearing on pages 4 to 56 of the abstract of record, and is predicated upon evidence alleged to have been discovered since July, 1933, of which claimants are alleged to have had complete knowledge, thus barring their rights against the estate of grounds of laches. The petition shows the allowance of the claim in the probate, circuit and appellate courts and the various proceedings resulting in the affirmance of the judgment by the Supreme court. The opinions of the appellate and supreme courts are set forth verbatim therein.

years after the [illegible]
court, presented [illegible]
file a petition in [illegible]
allowance of the [illegible]
Crimp Harvey." To [illegible]
as a "petition in the [illegible]
allowance of the claim of [illegible]
Crimp Harvey," which [illegible]
and James H. [illegible]
right to file the petition, [illegible]
like order was entered, from [illegible]
this appeal.

The claim in the [illegible]
Eugenia Crimp Bridge, [illegible]
agreement dated December [illegible] 1d
as executrix of the [illegible]
and Ezekiel [illegible]
position that all [illegible]
paid to or under [illegible] fraudulent
by the testatrix, and [illegible]
paid over or [illegible] thus
January, 1929.

The [illegible]
on pages 4 to 86 of [illegible]
evidence alleged to have [illegible]
claimants are alleged [illegible]
their rights against [illegible]
shows the allowance of [illegible]
appellate courts and the [illegible]
affirmance of the judgment by [illegible]
the appellate and supreme [illegible]

It is alleged that in order to avoid the defense of laches, interposed by the executor to the claim, various friends and neighbors of deceased testified that they had never heard of the existence of the trust and that Walter Crimp, one of the claimants, stated that after reading the will of his mother, the testatrix, he made a search in the recorders' offices of Will and Cook counties, the office of the clerk of the probate court, interviewed certain lawyers and officials of the Continental Illinois Bank & Trust Company, called upon certain friends of deceased, and that the first time he saw a copy of the contract involved was when it was produced in court on July 11, 1930. In order to meet the aforesaid testimony of claimants seeking to avoid the defense of laches, and to show diligence on the part of the executor, the petition further alleges that the executor and its counsel spent much time and effort searching for evidence of knowledge on the part of claimants of the existence of the trust created by the contract in question and in searching for the originals of releases or evidence as to the contents thereof, and that within two months prior to the filing of the petition no such evidence from competent sources had been discovered or brought to the attention of the executor.

The newly discovered evidence upon which the petition is predicated and by which the executor sought to prove that claimants long had knowledge of the existence of the trust, consisted of two items, first, the letter of Patrick J. Sexton, assignee of the interests of both Smith and Eastman in the contract entered into by them with testatrix, which was found in the files of the circuit court of Cook county in cause No. 263,174, being an appeal by the estate of Patrick J. Sexton from the allowance of a claim in the probate court filed by Ezekiel Smith. This purported letter was attached to a stipulation of facts and was dated December 26th.

It is alleged that [illegible]
interposed by the [illegible]
neighbors of deceased [illegible]
existence of the [illegible]
stated that after [illegible]
he made a search in [illegible]
counties, the office of [illegible]
certain lawyers and [illegible]
Trust Company, called [illegible]
the first time be made a copy of [illegible]
was produced in court on July 7, [illegible]
aforesaid testimony [illegible]
Jacobsen, and to show [illegible]
petition further [illegible]
much time and effort [illegible]
part of citizenship [illegible]
trust in question and [illegible]
evidence as to the [illegible]
prior to the filing [illegible]
sources had been discovered [illegible]
executor.

The newly discovered [illegible]
predicated and by [illegible]
long had knowledge [illegible]
items, first, the [illegible]
interests of [illegible]
by them with [illegible]
court of Cook county [illegible]
estate of [illegible]
probate court filed by [illegible]
attached to a stipulation of [illegible] December 16th.

There was no year after the date. That portion of the letter which is material to the issues herein involved follows:

"Mrs. Crimp was here a few days ago at my suggestion she brought with her the account of charges she had made on the children account and the oldest boy and the girl were also with her. She talked to them about turning the matter over to her and they said they would like to have it arranged that way."

Second, a letter press copy of a release dated December 20, 1904, found in the letter press book of McCulloch & McCulloch, attorneys representing the executor of the estate of Patrick J. Sexton, deceased, the material portions of which are as follows:

"Chicago, December 30, 1904.

FOR AND IN CONSIDERATION of the sum of Twelve Thousand Five Hundred Dollars ($12,500) to me in hand paid, the receipt of which is hereby acknowledged, I Eugenia Crimp Bridge (formerly Eugenia Crimp), as Executrix of the last will and testament of William G. Crimp, deceased, as trustee, and in my own personal right, and as assignee under and by virtue of the terms of an assignment executed the 25th day of March, A. D. 1902, between Walter E. Crimp, Alfred Crimp and Bessie Crimp, parties of the first part, and Eugenia Crimp, party of the second part, of the rights of Walter E. Crimp, Alfred Crimp and Bessie Crimp in the contract entered into the 29th day of December, 1893 between Ezekiel Smith, Joseph Eastman and Eugenia Crimp, and the proceeds arising therefrom, release and discharge the estate of Patrick J. Sexton, deceased, the Merchants' Loan and Trust Company as Executor of and Trustee under the last will and testament of said Patrick J. Sexton, deceased, the widow, heirs, legatees and devisees of said Patrick J. Sexton, deceased, Ezekiel Smith, Joseph Eastman, and their respective heirs, legal representatives and assigns from all claims, rights and obligations of every sort and nature. * * * I release and discharge the estate of Patrick J. Sexton, deceased, his Executor, widow, heirs, legatees and devisees from the claim this day allowed in my favor against the estate of said Patrick J. Sexton, in the Probate Court of Cook County, * * *."

Attached to the petition is the affidavit of James H. Cartwright as to the diligence shown by the executor and its attorneys in searching for evidence to show that claimants long had knowledge of the trust agreement, and the affidavit of Frank H. McCulloch, stating that he had prepared the original release from which the letter press copy was made and was familiar with the provisions of the contract of December 29, 1893, as well as the various assignments thereof mentioned in the letter press copy of the release; that when the release was drafted he "satisfied himself that said assignment did in fact by its terms assign to Eugenia Crimp all of the interest and rights of

There was no [illegible]

in material [illegible]

"Mrs. [illegible]
brought with her the [illegible]
account and the [illegible]
talked to them [illegible]
they would like to [illegible]

Second, a letter [illegible]

found in the [illegible]

representing the [illegible]

ceased, the [illegible]

"[illegible]

FOR [illegible]
Five Hundred [illegible]
of which is [illegible]
Eugenia Crump, [illegible]
William G. Crump, [illegible]
right, and [illegible]
assignment [illegible]
Walter R. Crump, [illegible]
first part, and [illegible]
rights of Walter R. Crump [illegible]
contract entered into [illegible]
Meekel Smith, [illegible]
arising therefrom, [illegible]
Sexton, deceased, [illegible]
Executor of and [illegible]
Patrick G. Sexton, [illegible]
of said Patrick [illegible]
and their respective [illegible]
all claims, rights [illegible]
I release and [illegible]
his executor, [illegible]
this day filed in [illegible]
Sexton, in the [illegible]

[illegible]

Certainly as to [illegible]
in searching for [illegible]
the trust agreement, [illegible]
that he had prepared [illegible]
copy was made and [illegible]
December 23, 1893, [illegible]
tioned in the letter [illegible]
was drafted by "[illegible]
its terms dealing [illegible]

Walter E. Crimp, Alfred Crimp and Bessie Crimp under the contract of December 29, 1893; and that before permitting the Merchants Loan & Trust Co. to pay to Eugenia Crimp Bridge, personally, the sum of Twelve Thousand Five Hundred ($12,500) Dollars he satisfied himself that said assignment was genuine."

Aside from the contention that the probate court had jurisdiction to review the allowance of the claim, it is urged that the petition stated such facts as would not justify the court in refusing to review the same. It is argued that the proferred evidence conclusively shows that the trust had been discussed in the presence of two of the beneficiaries and that the third had joined in a release of his rights thereunder. The forepart of this argument is based upon Sexton's letter of December 26th, addressed to Ezekiel Smith, wherein he purports to advise Smith that Mrs. Crimp had called on him shortly prior thereto at his suggestion and brought with her the account of charges she had made against claimants' interest in the trust, and that "the oldest boy and the girl were also with her she had talked to them about turning the matter over to her and they said they would like to have it arranged that way." By this letter it is sought to prove that the testatrix had kept accounts and that two of the claimants were at Sexton's office with her and therefore must have learned of the trust agreement. Relative to the question whether testatrix kept accounts, her oldest daughter testified on the hearing of the claim in both the probate and circuit courts that her mother kept no books, and in fact no books of account were ever found. On the second proposition, one Jacobs, Sexton's private confidential secretary from 1893 until the time of his death, whose desk was in the same office with Sexton, immediately adjoining it, testified that Mrs. Crimp always came to Sexton's office alone and that he had never seen claimants there. These claimants were not parties to the Sexton litigation in the circuit court, nor is it claimed that

[illegible] 2, Crimp, filed [illegible]
of December 29, 1893; [illegible] Loan
& Trust Co. to pay to [illegible]
"twelve " omaha five [illegible]
that said assignment [illegible]

Aside from [illegible]
diction to review the [illegible]
petition stated [illegible]
ing to review the case. [illegible]
conclusively show [illegible]
of two of the [illegible]
issue of his rights [illegible]
based upon Baxter's letter [illegible]
Smith, therein [illegible]
on him shortly prior [illegible]
the account of charges [illegible]
the trust, and that "the [illegible]
she had failed to [illegible]
said they would like [illegible]
it is sought to prove [illegible]
two of the claimants [illegible]
must have learned [illegible]
whether testatrix kept [illegible]
hearing of the claim [illegible]
mother kept no book [illegible]
found. [illegible]
fidential [illegible]
was in the case [illegible]
fied that [illegible]
had never seen [illegible]
the action [illegible]

they had knowledge concerning either the litigation or of the letter upon which the newly discovered evidence is predicated. In fact, it is not contended that they had any knowledge of the existence of the letter or of the proceedings until disclosed by the filing of the executor's petition to review the claim. Moreover, while the letter states that the two children were with her when she called on Sexton, it does not say that they were in the room, within hearing distance of the conversation alleged to have been had between Sexton and Mrs. Crimp, or that they were parties to the conversation or understood what Sexton and Mrs. Crimp were discussing. That portion of the letter which states that "she had talked to them about turning the matter over to her and that they said they would like to have it arranged that way," does not refer specifically to the trust moneys, and no definite inference can be drawn from the statement alone that she referred to the subject matter of the trust. Both Sexton and Mrs. Crimp were long dead when the claim was heard in the probate court, and the admissibility of the letter upon a rehearing is extremely doubtful, inasmuch as no opportunity would be afforded claimants for cross-examination as to the truth or falsity of the matters set forth in the letter or of showing that Sexton was mistaken, or in connivance with Mrs. Crimp. The allowance of the claim was predicated upon the breach of trust by testatrix, and the executor's counsel challenges Sexton's integrity by asserting in his affidavit "that from said file it appears conclusively that said Patrick J. Sexton, in addition to other efforts to defeat Eugenia Crimp Bridge in the collection of any part of the principal of the trust here involved, kept a false set of books wherein improper charges were made for the purpose of convincing Eugenia Crimp Bridge that there was no profit payable to her from the Sanitary District contract, * * *." In view of the doubt thus cast upon the integrity of both Mrs. Crimp Bridge and Sexton, claim-

they had knowledge concerning [illegible] the authenticity of the letter upon which [illegible]. In fact, it is not contended [illegible] existence of the letter [illegible] the filing of [illegible] over, while the letter [illegible] when she called on [illegible] room, within hearing [illegible] been had between [illegible] to the conversation or [illegible] discussing. That position [illegible] had talked to them about [illegible] they said they would like [illegible] refer specifically to the [illegible] can be drawn from [illegible] ject matter of the [illegible] when the claim was heard in the [illegible] of the letter upon [illegible] opportunity could be afforded [illegible] the truth or falsity [illegible] showing that [illegible] The allowance of the claim [illegible] by testatrix, and [illegible] rity by asserting in [illegible] conclusively that said [illegible] to defeat Eugenia [illegible] principal of the [illegible] wherein improper [illegible] Eugenia Grimp Bridge [illegible] the Sanitary District [illegible] cast upon the integrity of both Mr. Grimp Bridge and Newton, claim-

ants could hardly be charged with knowledge of the trust upon the faith of Sexton's vague reference to their presence in his office, even though the letter were admissible in evidence. In Garlick v. Mutual Loan & Building Ass'n, 187 Ill. App. 591, a bill of review set up newly discovered evidence consisting of a report found in the state auditor's office in which certain admissions from the secretary of the loan and building association were set forth. The writer of the report was dead, and the court said, "at most the showing is that plaintiff might have proved something by the inspector (i.e., the person making the report) if he had not, unfortunately, died." We think the utmost importance to be attached to Sexton's letter was that he might have been a witness if he were alive.

The letter press copy of the release, which constitutes the other item of newly discovered evidence upon which the executor sought to have the claim reviewed, was found in the letter press book of McCulloch & McCulloch, attorneys representing the estate of Patrick J. Sexton, deceased. The Merchants Loan & Trust Co., as executor and trustee of Sexton's estate, were paying Eugenia Crimp Bridge $12,500 in full settlement of her claim against Sexton, and a general release was prepared to protect the bank. By the letter press copy the executor herein sought to prove the recitals made in the document and thus lay basis for the claim that the beneficiaries, claimants herein, had in fact themselves assigned all of their interest under the trust agreement to Eugenia Crimp Bridge, their stepmother. It may be assumed that Mr. McCulloch prepared a release at that time to be signed by claimants, but the original of the release was never produced and there is nothing in the letter press copy that could be considered as competent evidence to prove the execution of a release by these claimants. Mr. McCulloch's affidavit states that he "was advised that Walter E. Crimp, Alfred

ants could hardly be [illegible]
faith of Sexton' [illegible]
even though [illegible]
Mutual Loan & Building [illegible]
set up a fly-by-night [illegible]
the state auditor [illegible]
secretary of [illegible]
writer of the [illegible]
shooting is that [illegible]
spector (i.e., the person [illegible]
fortunately, [illegible]
to Sexton's letter [illegible]
were alive.

The last [illegible]
the other item [illegible]
sought to have [illegible]
book or [illegible]
Patrick J. Sexton, [illegible]
executor and trustee [illegible]
Bridge $12,500 in full [illegible]
a general release [illegible]
press copy the executor [illegible]
the document [illegible]
claimants herein, [illegible]
terest under the trust [illegible]
stepmother. [illegible]
issue at that time [illegible]
the release was never [illegible]
press copy [illegible]
the creation of [illegible]
affidavit at the [illegible]

Crimp and Bessie Crimp Harvey, the beneficiaries of the contract of December 29, 1893, had assigned to Eugenia Crimp Bridge all of her right, title and interest in and to the proceeds of that contract," but it does not say from whom he obtained that information or that he ever talked to any of the claimants or any attorney representing them, and if he were permitted to testify his evidence would not be any stronger than the affidavit attached to the executor's petition. Even if he were permitted to identify the letter press copy as a correct copy of the original release, there would still be lacking the necessary proof that these claimants executed the assignment, and without that proof or competent evidence that they had signed the assignment or knew of its existence, they could not be charged with knowledge of the trust. Mr. McCulloch's affidavit further states that he "was informed" that claimants were of age, but he does not state where he received the information, and evidently affiant never talked to claimants themselves or had any personal contact with them. The pertinent ultimate facts sought to be established by the letter press copy and Mr. McCulloch's proferred testimony were whether claimants really executed the assignments or had sufficient understanding of the transaction to charge them with knowledge of the existence of the trust, and neither of these facts are convincingly established by the newly discovered evidence in the form in which it is presented.

Bills of review and bills in the nature of bills of review may be predicated upon errors appearing on the face of the record, fraud, and newly discovered evidence. For errors appearing on the face of the record, and fraud, such proceedings may be filed without leave of court. (Harrigan v. County of Peoria, 262 Ill. 36, 41; Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 266 Ill. App. 130, 138.) Where it is sought to set aside a decree on the ground of newly discovered evidence, however, leave of court must first be

Quimp and Bessie Quimp Harvey, the [illegible] of
of December 29, 1963, had assigned to [illegible] Quimp [illegible]
of her right, title and interest in and to the proceeds of that
contract," but it does not say from whom he [illegible]
mation or that he ever talked to [illegible]
attorney representing them. [illegible]
his evidence would not be any [illegible]
to the executor's petition. [illegible]
the letter press copy as a correct copy of the original [illegible],
there would still be hearsay [illegible]
executed the assignment, and [illegible]
that they had signed an assignment [illegible], they
could not be charged with [illegible]
affidavit further stated [illegible]
of age, but he does not state [illegible]
evidently affiant never [illegible]
personal contact with them. [illegible]
be established by the letter press copy [illegible]
testimony were whether [illegible]
had sufficient understanding [illegible]
knowledge of the existence of the trust, [illegible]
are convincingly established by the newly discovered [illegible]
form in which it is presented.

Bills of review and bills in the nature of bills of review
may be predicated upon errors [illegible]
fraud, and newly discovered evidence. [illegible]
face of the record, and fraud, [illegible]
leave of court. (Harrigan v. [illegible], [illegible] Ill. [illegible], 41;
Hector Johnson Mfg. Co. v. Alfred Johnson Mfg. Co., [illegible] Ill. App.
130, 138.) Where it is sought to set aside a decree on the ground
of newly discovered evidence, however, it is of course must that be

had to authorize the filing of the petition or bill. There is thus vested in the court a discretion to determine whether the newly discovered evidence is competent, whether it is merely cumulative, and whether it is likely to change the result of the proceeding, and when the petition is presented the court considers its statements, the affidavits supporting it, and the record in the original case, and then upon looking at the whole case the court will exercise a sound judicial discretion in determining whether or not the newly discovered evidence affords a basis for reviewing the judgment or decree, and unless such discretion has been abused the decision will not be disturbed. (Elzas v. Elzas, 183 Ill. 132.) In the instant proceeding both the probate and circuit courts undoubtedly considered the doubtful competency of Sexton's letter, the circumstances under which it was written, the relationship of the parties and the probative value of the statements therein contained, and also the absence in the letter press copy and Mr. McCulloch's affidavit of convincing evidence that the purported releases of claimants to Mrs. Grimp Bridge had ever been executed. The authorities are clear that the newly discovered evidence must be of such character that a different result would take place if it were before the court on the original hearing (Elzas v. Elzas, 183 Ill. 132; Waterman v. Hall, 298 Ill. 75; Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 266 Ill. App. 130), and we think that neither the Sexton letter nor the letter press copy of release, even if they should be admitted in evidence, would be of such conclusive and decisive character as to bring about a different result. The issue raised by the Sexton letter is rebutted by testimony already in evidence, and the letter press copy together with Mr. McCulloch's proferred evidence would at most merely show that Mr. McCulloch was at the time satisfied that his description of the assignment contained

bed to authorize the [illegible] in
them vested in the court [illegible] the
newly discovered evidence [illegible]
cumulative, and whether it is likely to [illegible] the
proceeding, and when [illegible] considers
its statements, the [illegible] in the
original case, and then upon [illegible]
will exercise a sound judicial [illegible] or
not the newly discovered [illegible]
the judgment or decree, [illegible] based
the decision will not be [illegible]. [illegible] 1. 1.
In the instant proceeding [illegible] unquestionably [illegible]
the circumstances [illegible]
the parties and the probative [illegible]
tained, and also the [illegible]
McCullochs of identity [illegible]
release of claimants to [illegible]
The authorities are [illegible]
be of such character [illegible]
it were before the court on [illegible]
185 Ill. 132; Waterman v. [illegible]
Co. v. Fred Johnson Estate Co., [illegible]
that neither the testimony [illegible]
even if they sought to [illegible]
cumulative and relative [illegible]
The issue raised by the [illegible]
in evidence, and the latter [illegible]
preferred evidence [illegible]
at the time satisfied [illegible]

in the release was correct, but it could not change the result of the hearing without testimony that claimants in fact executed the assignment or had knowledge of the trust agreement. This apparently Mr. McCulloch was unable to prove, and no other evidence is suggested for establishing that essential fact.

In their reply brief executor's counsel argue that Sexton's letter to Smith, containing a report upon partnership matters and also upon the liability to Mrs. Crimp Bridge, contained memoranda made in the ordinary course of business and constituted admissions against interest, and that the letter would be admissible upon that ground. Holding as we do that the letter is too vague and unsatisfactory to afford any competent basis upon which the claim should be reviewed, we deem it unnecessary to further extend this opinion by a consideration of the legal ground upon which the letter is sought to be introduced.

The only other controverted question between the parties is whether the probate court had jurisdiction to review the allowance of the claim upon the petitions presented. In view of our conclusions as to the merits of the petitions, it will be unnecessary to consider the jurisdictional question.

We are of the opinion that neither the probate nor circuit courts abused their discretion in refusing to allow the executor to file the petitions, and the judgment of the circuit court is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

[illegible]

[illegible]

[illegible]

63 4

38405

MARIE CONROY,
Appellee,

v.

MRS. HARRY J. RENN,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

285 I.A. 594

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for personal injuries sustained by her while riding as a passenger in defendant's automobile in New York city. Trial was had by jury, resulting in a verdict and judgment for $4,000, from which defendant appeals. A special interrogatory was submitted to the jury inquiring whether defendant was driving her automobile at the time and place in question in such manner as to constitute a willful, wanton and malicious disregard for plaintiff's safety, and the jury answered the interrogatory, "Yes," and returned same with their general verdict.

The essential facts disclose that plaintiff was employed as a maid in defendant's household and had temporarily accompanied her to New York city. While there, on August 14, 1932, after plaintiff had completed her duties for the day, defendant invited her to go shopping. Later they drove through Central Park and ultimately arrived at a restaurant at 60th street and Lexington avenue, at about ten p. m. Plaintiff ordered a sandwich and coffee, and defendant took whisky. Shortly after their arrival some of defendant's friends came into the restaurant. Defendant asked plaintiff to wait for her, and accompanied her friends to the rear of the restaurant where she remained until about one a.m. She then

38405

MARY [illegible],
Appellee,

v.

MRS. MARY A. [illegible],
Appellant.

MR. JUSTICE WHITE [illegible]

[illegible]
sustained by Mr. [illegible]
mobile in New York city. [illegible]
verdict and judgment [illegible]
special interrogatory [illegible]
defendant was driving [illegible]
question in such manner [illegible]
malicious disregard [illegible]
the interrogatory, "Yes" [illegible]
verdict.

The essential facts are as follows: [illegible]
as a maid in defendant's household [illegible]
her to New York city. [illegible]
tiff had completed her [illegible]
go shopping. Later they [illegible]
arrived at a restaurant [illegible]
about ten p. m. [illegible]
defendant took whisky. [illegible]
ant's friends came into [illegible]
to wait for her, and [illegible]
restaurant where [illegible] the then

returned to plaintiff's table, and they left the restaurant to return home. Defendant drove the car and plaintiff was seated in the rear. As they approached Third avenue, plaintiff noticed that defendant was driving carelessly, she thought, and faster than she should, and requested her to drive slower. Defendant replied, "don't worry. Everything is allright." According to plaintiff's testimony defendant continued to drive carelessly and plaintiff asked her to stop the car so that she might get out, but defendant refused. The car was then proceeding at the rate of 42 miles an hour. Shortly after this conversation the car swerved to the left and ran into an elevated structure. Plaintiff was rendered unconscious and driven to the Flower Hospital in a taxicab. She remained there from August 14th to August 27th, and then returned to Chicago with defendant.

Plaintiff submitted her case by first taking the stand in her own behalf and testifying to the events leading up to the accident. On cross-examination defendant's counsel interrogated her about a written statement given to one Paul Menges, dated November 3, 1932, by which defendant sought to impeach plaintiff's testimony as to the manner in which the accident occurred, touching principally upon the question of the willful and wanton manner in which defendant was charged with having driven the car when the accident occurred. Certain portions of the statement pertaining to the injuries sustained by plaintiff are as follows:

"When the car struck I was knocked unconscious. The rear view mirror broke and that hit me over the nose and right eye. I did not regain consciousness until I was about half way to the hospital. I remained in the hospital for two weeks. I was under the Doctor's care until I left New York about September 13th. Since I have been back here I have had Dr. Gustafson, a woman doctor. * * * The doctor says it is necessary that I have an operation very quickly to avoid my lower eyelid from drooping down and to save the eye. There was some infection and this drained out through the right eye. There is still a little draining. The Doctor also said there might have to be some skin grafted there. There was some of the eylid torn or cut out at the time I was hurt. I have a little obstruction in my nose on the right side."

returned to plaintiff's [illegible] to return home. [illegible] in the rear. [illegible] that defendant [illegible] then she should [illegible] replied, "don't worry." [illegible] plaintiff's testimony [illegible] plaintiff asked her to [illegible] defendant refused. [illegible] miles an hour. [illegible] the left and ran into a elevated structure. [illegible] unconscious and driven to the Tower hospital [illegible] remained there from August [illegible] to Chicago with defendant.

Plaintiff submits [illegible] her own behalf and [illegible] On cross-examination [illegible] written statement given [illegible] by which defendant [illegible] the manner in which the collision occurred, [illegible] the question of the liability [illegible] charged with having [illegible] tain portions of the testimony [illegible] by plaintiff are as follows:

"When the car stopped [illegible] view mirror broke and hit me [illegible] did not regain consciousness until [illegible] hospital. I remained in the hospital [illegible] the Doctor's care until [illegible] I have been back here in Chicago [illegible] * * * The doctor [illegible] very painful to avoid my [illegible] have the eye. There was [illegible] through the right eye. [illegible] Doctor also said there [illegible] There was some of the glass [illegible] I have a little [illegible] time I was [illegible] side."

Bridie Gilmore was next called as a witness on behalf of plaintiff. She stated that she had seen plaintiff on June 8, 1932, prior to the accident, and was about to testify as to plaintiff's physical condition at the time when the following ensued:

"Q. And what was the physical condition of her face at that time?
Mr. Keogh (Counsel for defendant): Judge, we can shorten this. I do not question the injury. I mean, if this is to show she was all right before she went to New York.
Mr. Johnson (Counsel for plaintiff): Yes.
The Court: All right, Miss Gilmore, we will excuse you. There is no question about the injury?
Mr. Keogh: No, there is not, Judge."

Neither Dr. Gustafson, who had attended plaintiff after her return to Chicago, nor the physicians who attended her in New York, were called as witnesses and no medical testimony was offered to prove the nature and extent of the injuries sustained. At the conclusion of Miss Gilmore's evidence plaintiff rested. Defendant's motion for a peremptory instruction was overruled, and Paul Menges was thereupon called as the sole witness for defendant. His testimony related to the manner in which the foregoing statement was procured from plaintiff, and was offered solely for purposes of impeachment.

Prior to the hearing defendant had made a motion for a continuance on the ground that defendant was absent in New York. It was an oral motion, and no satisfactory explanation was made for defendant's absence. Counsel urges the court's refusal to grant a continuance as ground for reversal. However, since the Civil Practice act requires that such motions be supported by the affidavit of the party so applying or his authorized agent (Ill. State Bar Stat., 1935, chap. 110, par. 237, rule 14, p. 2453), and no such affidavit was presented, we think the court was justified in its discretion in overruling the motion. Before resting her case, defendant's counsel offered evidence to explain his client's absence from the trial, and the court permitted him, with the con-

Bridie Gilmore [illegible] testimony on behalf of plaintiff. He stated that he was [illegible] June 5, 1940, prior to the accident, and was shown to possess the plaintiff's physical condition at the time when the following [illegible] were:

"Q. And that was the physical condition [illegible] that time?

Mr. Keogh (Counsel for [illegible]): [illegible] think. I do not question the injury, I mean, I'm [illegible] she was all right before the accident [illegible].

Mr. Johnson (Counsel for [illegible]): [illegible].

The Court: All right, [illegible] proceed.

There is no question about the injury.

Mr. Keogh: So, there is no injury."

Neither Mr. Gustafson, who [illegible] nor Dr. [illegible] after her return to Chicago, nor the physicians who [illegible] in New York, were called as witnesses and no medical [illegible] effort to prove the nature and extent of the injury [illegible] the conclusion of [illegible] motion for a peremptory instruction as to [illegible] was thereupon called on the only witness [illegible] testimony related to the manner in which the [illegible] occurred from plaintiff, and [illegible] or [illegible] development.

Prior to the [illegible] testimony on the ground [illegible] testimony on [illegible]. It was an oral motion, and [illegible] for defendant's benefit. [illegible] to grant a continuance [illegible] ground for reversal. [illegible], the Civil Practice Act requires that such motions be accompanied by the affidavit of the party or his attorney [illegible] Bar Stat., [illegible]. [illegible] such affidavit [illegible] the trial court was justified in its discretion in overruling the motion. After trying her case, defendant's counsel offered evidence to explain Mr. [illegible]'s absence from the trial, and the court [illegible] with the con-

sent of plaintiff's counsel, to have the record show, without any explanation for her absence, that defendant was absent from the city and not available as a witness. Defendant then introduced in evidence plaintiff's statement obtained by Menges, and rested her case.

The court thereupon inquired whether there was "anything else," and the following ensued:

"Mr. Johnson: That is all with the one exception that I would like to show the plaintiff to the jury so they would have an opportunity to observe the extent of her injury.
Mr. Keogh: Well, your Honor, I don't know about that. Here is a case without any medical testimony whatever. I admit she was injured. What kind of an injury it is we don't know; whether it is curable or not curable. I object to showing her to the jury.
The Court: I am willing that the plaintiff may step up and stand before the jury and the jury may look at her. To that extent, without any further explanation, that may be done.
Mr. Johnson: Yes.
Mr. Keogh: You will allow my objection to her showing it?
The Court: Very well, the objection will be overruled.
(The plaintiff thereupon stepped before the jury box.)
The Court: I would also like her to tell what, if any, impairment of vision she has. All right.
Mr. Johnson: That is enough, Miss Conroy."

As grounds for reversal it is urged (1) that the verdict was grossly excessive and was arrived at by speculation and not by testimony produced at the trial; and (2) that the court erred in allowing plaintiff to display her injuries to the jury. In support of the first contention it is earnestly argued that the record contains no evidence of any pain suffered by plaintiff, that no medical testimony was offered on her behalf to show that she suffered pain or that any pain would necessarily result from the nature of her injuries, and that no reasonable inference can be drawn from the testimony that any serious injury resulted from the accident. It is pointed out as significant that at the close of the evidence offered by plaintiff the court addressed the following inquiry to her counsel:

"The Court: Mr. Johnson, may I inquire what was the injury?
Mr. Johnson: It is an eye injury, your Honor. Her eye was injured.
The Court: All right."

sent of plaintiff's counsel, to [illegible] any examination [illegible] the city and not available [illegible] duced in evidence [illegible] rested her case.

The court [illegible] else," and the [illegible]

"Mr. Johnson: That [illegible] I would like to show the [illegible] an opportunity to observe [illegible]

Mr. Asgyn: [illegible]

Here is a [illegible] who was injured. [illegible] whether it is our [illegible] the jury.

The Court: [illegible] and state whether the jury [illegible] extent, without [illegible]

Mr. Johnson: [illegible]

Mr. Asgyn: [illegible] it?

The Court: [illegible]

(The [illegible])

The Court: [illegible] impairment of vision [illegible]

Mr. Johnson: [illegible]

As grounds [illegible] was grossly [illegible] testimony produced [illegible] allowing plaintiff [illegible] of the first [illegible] taine no evidence [illegible] testimony was of [illegible] or that any pain and [illegible] injuries, and [illegible] testimony that [illegible] pointed out [illegible] by plaintiff [illegible]

"The Court: Mr. Johnson, [illegible] the jury injured.

Mr. Johnson: [illegible] injury [illegible] was injured.

The Court: All right."

In instructing the jury the court carefully defined willfulness and wantonness and differentiated the same from ordinary negligence, but failed to include any instruction on the theory of exemplary or vindictive damages. We must assume, therefore, that the verdict of $4,000 represents compensatory damages. In view of the fact that the evidence relating to plaintiff's injuries is extremely scant, and is limited to the statements made by her to Menges, unsupported by medical or other evidence, we think the verdict is excessive. Plaintiff's counsel argues that pain must have accompanied the injuries, but the record is silent on the subject. The extent of plaintiff's injuries is left entirely to speculation and conjecture. There is nothing to indicate whether the eye injury was of a permanent nature, and no evidence of the nature of the operation which plaintiff stated Dr. Gustafson advised her to undergo. It is argued that plaintiff "is scarred for life," but there is no evidence in the record to justify the conclusion that the injury would produce a permanent scar. The cause was loosely tried. As heretofore stated no medical testimony whatever was presented to the jury from which it could ascertain with any degree of definiteness the seriousness or extent of plaintiff's injuries, and after a careful examination of the record we are impelled to concur with defendant's contention that the verdict was reached by speculation and conjecture. To sustain a verdict of $4,000, which under the charge of the jury must be held to have been based on compensatory damages alone, it should appear that plaintiff received injuries of a serious and permanent nature or that she suffered pain, loss of employment or was threatened with some permanent inpairment. There is nothing in the record to so indicate. Under the circumstances we think the case should be retried so as to afford plaintiff an opportunity of presenting evidence, if she can, from which another jury may ascertain the nature and extent of her iinjuries and assess damages accordingly.

In instructing the jury [illegible] injuries and contributory negligence, but [illegible] exemplary or vindictive [illegible] the verdict or [illegible] the fact that she [illegible] extremely acute, one in which [illegible] hence, unsupported by medical evidence, [illegible] verdict is excessive. In [illegible] have accompanied the injury [illegible] ject. The extent of [illegible] specification and conjecture. [illegible] the eye injury was [illegible] nature of the operation which [illegible] her to water. It is true [illegible] but there is no evidence in the record to [illegible] that the injury would [illegible] loosely tried. [illegible] was presented to the jury [illegible] degree of definiteness [illegible] injuries, and [illegible] impelled to conclude [illegible] rendered by [illegible] $4,000, which [illegible] based on [illegible] received injuries of [illegible] suffered pain, [illegible] ment in [illegible] Under the [illegible] to afford [illegible] can, from which [illegible] her injuries and assess damages accordingly.

During the pendency of this proceeding plaintiff moved to strike from the files an additional abstract of record filed by defendant. Prior thereto defendant had obtained leave to file the additional abstract. Notice of that motion was served upon plaintiff's attorneys, in accordance with the rules, but no suggestion or countersuggestions were filed in opposition to the motion. Relying upon the order of this court granting leave to file the additional abstract, defendant caused copies of same to be printed and filed with the clerk of this court. Since no objection was interposed by plaintiff to the motion for leave to file, and defendant had been put to the expense of preparing the additional abstract, we think the motion to strike comes too late, and it is therefore denied.

For the reasons stated the judgment of the superior court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

[illegible]

to [illegible]

by defendant. [illegible]

file the [illegible]

upon [illegible]

no [illegible]

the motion. [illegible]

file the [illegible] abstract,

printed [illegible]

was interposed by [illegible]

defendant [illegible]

abstract, we think [illegible]

therefore denies.

For the reasons [illegible]

is reversed [illegible]

Beasley, P. J., and [illegible]

38457

JOHN CHRENKA and
FLORENCE CHRENKA,
Appellees,

v.

WILLIAM D. MEYERING,
Sheriff of Cook County,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

285 I.A. 594

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

William D. Meyering, as sheriff of Cook county, appeals from a judgment for $1,000 and costs rendered against him in the circuit court, based upon damages resulting from a levy made on personal property belonging to plaintiffs, judgment debtors.

Plaintiffs declaration charges trespass and avers that the sheriff, on April 15, 1933, unlawfully took and seized certain goods and chattels of plaintiffs which were exempt from execution; also that the sheriff took and seized certain chattels and converted them to his own use, and with force and arms took possession of the meat market of plaintiff, dispossessed him, locked the doors of his store, took the keys and refused to permit plaintiff to continue to carry on his business on the premises or to enter same. Upon the hearing Florence Chrenka, plaintiff's wife, was made an additional plaintiff, but the declaration was not amended. Defendant interposed a plea of the general issue and pleaded specially to the first count that the goods and chattels were seized under and by virtue of a certain execution against the plaintiff and were not exempt, and that the goods were returned to the plaintiff April 18, 1933, upon his filing a schedule claiming exemption and making a

38457

JOHN CHUCHNA and
FLORENCE CHUCHNA,
Appellees,

v.

WILLIAM D. MCWHINE,
Sheriff of Cook County,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF
COOK COUNTY.

PRELIMINARY

MR. JUSTICE [illegible] delivered the opinion of the court:

William D. McWhine, as sheriff of Cook county, appeals from a judgment for $[illegible] and costs rendered against him in the circuit court, based upon damages resulting from a levy made on personal property belonging to plaintiffs, John and Florence Chuchna.

Plaintiffs declaration charges trespass and avers that the sheriff, on April 13, 1933, unlawfully took and seized certain goods and chattels of plaintiffs which were exempt from execution; also that the sheriff took and seized certain [illegible] and converted them to his own use, and with force and arms took possession of the meat market of plaintiffs, dispossessed him, took [illegible] the room of his store, took the keys and refused to permit [illegible] to continue to carry on his business on the premises [illegible].

Upon the hearing Florence Chuchna, plaintiff, [illegible], was made an additional plaintiff, but the declaration was not amended. Defendant interposed a plea of the general issue and pleaded specially to the first count that the goods and chattels were seized under and by virtue of a certain execution against the plaintiff and were not exempt, and that the goods were returned to the plaintiff April 18, 1933, upon his filing a schedule claiming exemption and making a

tender of real estate. As to the third count, the plea averred that plaintiff voluntarily surrendered and abandoned possession of the store.

The essential facts disclose that in January, 1933, one Frank Ricar recovered judgment against plaintiffs in the municipal court for $723 and costs. Execution issued thereon and was delivered to the sheriff, who, on April 15, 1933, made demand under the execution and on the same day levied on plaintiffs' goods and chattels, consisting of certain meats and equipment contained in plaintiff's meat market in Cicero. The customary notice was posted on plaintiffs' store window, inventory was taken and the property was advertised for sale.

April 18, 1933, three days after the levy, plaintiff John Chrenka presented his debtor's schedule claiming ownership of part of the goods and chattels levied upon, and on the same day tendered in writing certain real estate subject to levy, which, however, had been levied upon under a prior judgment as well as the judgment herein, and released, presumably, because of the prior levy. On the same day the sheriff also released the levy. There is a conflict in the evidence as to whether the sheriff returned the goods and chattels to plaintiffs on April 18, 1933, when the schedule was filed, or whether he retained same until the following Monday, April 24th.

John Chrenka testified that when the levy was made on April 15th the deputy sheriff closed the store and "pushed me out of the back door and sent us home;" that thereafter notice of sheriff's sale was posted on the door, listing various goods and chattels levied upon; that he filed a debtor's schedule, dated April 17th, signed and sworn to by him, claiming certain exemptions, including the scales, a meat grinder, one slicing machine and an

tender of real estate. As to the third count, the plea averred that plaintiff voluntarily surrendered and abandoned possession of the store.

The essential facts disclose that in January, 1932, one Frank Rizer recovered judgment against plaintiff in the municipal court for $732 and costs. Execution issued thereon and was delivered to the sheriff, who, on April 1o, 1932, made demand under the execution and on the same day levied on plaintiff's goods and chattels, consisting of certain meats and equipment contained in plaintiff's meat market in Cicero. The customary notice was posted on plaintiffs' store window, inventory was taken and the property was advertised for sale.

April 18, 1932, three days after the levy, plaintiff John Chwenke presented his debtor's schedule claiming exemption of part of the goods and chattels levied upon, and on the same day tendered in writing certain real estate subject to levy, which, however, had been levied upon under a prior judgment as well as the judgment herein, and released, presumably, because of the prior levy. On the same day the sheriff also released the levy. There is a conflict in the evidence as to whether the sheriff returned the goods and chattels to plaintiffs on April 1., 1932, when the schedule was filed, or whether he retained same until the following Monday, April 24th.

John Chwenke testified that when the levy was made on April 15th the deputy sheriff closer the store and "pushed me out of the back door and sent me home;" that thereafter notice of sheriff's sale was posted on the door, listing various goods and chattels levied upon; that he filed a debtor's schedule, dated April 17th, signed and sworn to by him, claiming certain exemptions, including the scales, a meat grinder, one slicing machine and an

electric refrigerator and various other tools and accessories incidental to the meat business. He further testified that the ice box contained certain fresh meats which had been placed there on Saturday, April 15th, the date of the levy; that the deputy sheriff placed a custodian in charge who refused plaintiffs access to the ice box except for inspection purposes and told him that he could not sell or remove the meats contained therein. There were two keys to the premises, one of which was delivered to the custodian in charge of the premises and the other apparently remained in the possession of the plaintiff John Chrenka. The sheriff instructed the custodian, in Chrenka'a presence, that plaintiffs might enter the premises and look after the meats in the ice box, but that they were not to remove same. Chrenka testified that he returned to the store on Monday, April 17th, and again on the following Wednesday, to look at the meats, which remained in the refrigerator for ten days and eventually spoiled so that they could not be sold or used. He testified that the reasonable market value of the provisions contained in the ice box was approximately $125, and to the average sales of his business during January, February and March, 1933, which were estimated at approximately $350 a week during that period, on which he claimed a profit of 20% to 25%. Upon these facts the jury assessed his damages at $1,000, and judgment was entered on the verdict.

It is conceded that the sheriff may levy upon personal property immediately upon demand, and is not required to wait until the expiration of ten days after the debtor is notified of the execution. (Lenzi v. Zimmer, 210 Ill. App. 260.) It is urged, however, that plaintiff claimed his exemption and tendered real estate to the sheriff out of which the judgment might be satisfied, but that notwithstanding these facts the sheriff remained in

electric refrigerator and various other tools and accessories incidental to the meat business. Mr. Mather testifies that the ice box contained certain fresh meats which had been placed there on Saturday, April 18th, the date of the levy; that the deputy sheriff placed a custodian in charge who refused plaintiffs access to the ice box except for inspection purposes and told him that he could not sell or remove the meats contained therein. There were two keys to the premises, one of which was delivered to the custodian in charge of the premises and the other apparently retained in the possession of the plaintiff John Gherardi. The sheriff instructed the custodian, in Gherardi's presence, that plaintiffs might enter the premises and look after the meats in the ice box, but that they were not to remove same. Gherardi testified that he returned to the store on Monday, April 17th, and again on the following Wednesday, to look at the meats, which remained in the refrigerator for ten days and eventually spoiled so that they could not be sold or used. He testified that the reasonable market value of the provisions contained in the ice box was approximately $132, and to the average sales of his business during January, February and March, 1922, which were estimated at approximately $[illegible] a week during that period, on which he claimed a profit of 20 [illegible]. Upon these facts the jury assessed his damages at $[illegible], and judgment was entered on the verdict.

It is conceded that the sheriff may levy upon personal property immediately upon demand, and is not required to wait until the expiration of ten days after the debtor is notified of the execution. (Lenzi v. Kimmer, 210 Ill. App. 260.) It is urged, however, that plaintiff claimed his exemption and tendered real estate to the sheriff out of which the judgment might be satisfied, but that notwithstanding these facts the sheriff remained in

possession for some ten days after the claim for exemption was made. It appears from the record, however, that Chrenka's claim for exemption was not made until April 18th, and that he received the goods and chattels back on April 24th. The real controversy between the parties is whether or not the sheriff wrongfully retained the goods for an unreasonable period of time after Chrenka made his claim for exemption, and this question was submitted to the jury as one of the controverted issues of fact.

Among the grounds for reversal it is urged that the court's instructions were erroneous and that the verdict and judgment are excessive. With reference to the first contention, we find that the court, in the third instruction, charged the jury as follows:

> "If you find from the evidence in this case that the sheriff of Cook County wrongfully levied upon the plaintiffs' property, and that said property was exempt from execution, then and in such case the defendant is liable to the plaintiffs for such damages, as are shown by the evidence, if any, to have been sustained by the plaintiffs."

This instruction seems to be predicated upon the theory that the levy was unlawful, and the jury were told in effect that if the property levied upon was exempt from execution that the levy was wrongfully made. This seems to have been the theory upon which plaintiffs tried their case, as shown by the first point urged by defendant in his brief. It is there argued that the sheriff may levy upon personal property immediately upon demand, and that he is not required to wait until the expiration of ten days after the debtor is notified of the execution, and cases are cited to support this position. (Lenzi v. Zimmer, supra, and Weskalnies v. Hasterman, 288 Ill. 199.) Plaintiffs now concede this rule of law to be correct, but evidently on the hearing their counsel took another view and made the contention that the sheriff could not levy without first waiting until the ten days had expired within which the debtors might file their schedule for exemptions.

possession for some time prior thereto in for exemption was made. It appears from the record, however, that Dunnett's claim for exemption was not made until April 17th, nor until he received the goods and contracts been on April 16th. The real controversy between the parties is whether or not the chattels, lawfully retained the goods for an unreasonable period of time after Dunnett made his claim for exemption, and this question was submitted to the jury as one of the controverted issues of fact.

Among the grounds for reversal it is urged that the court's instructions were erroneous and that the verdict and judgment are excessive. With reference to the first contention, we find that the court, in the third instruction, charged the jury as follows:

> "If you find from the evidence in this case that the sheriff of Cook County wrongfully levied upon the plaintiffs' property, and that said property was exempt from execution, then and in such case the defendant is liable to the plaintiffs for such damages, as are shown by the evidence, if any, to have been sustained by the plaintiffs."

This instruction seems to be predicated upon the theory that the levy was unlawful, and the jury were told in effect that if the property levied upon was exempt from execution the levy was wrongfully made. This seems to have been the theory upon which plaintiffs tried their case, as shown by the first point urged by defendant in his brief. It is there argued that the sheriff may levy upon personal property immediately upon demand, and that he is not required to wait until the expiration of ten days after the debtor is notified of the exemption, and cases are cited to support this position. (Lamb v. Hyser, supra, and Hawkins v. Masterman, 288 Ill. 199.) Plaintiffs now concede this rule of law to be correct, but evidently on the hearing their counsel took another view and made the contention that the sheriff could not levy without first waiting until the ten days had expired within which the debtor might file their schedule for exemptions.

At any rate, the instruction is misleading and improperly states the rule of law applicable and evidently permitted the jury to find that the levy, which is shown by the evidence to have been lawfully made and now conceded by plaintiffs to have been so, to be unlawful.

Inasmuch as the cause will have to be retried, we deem it unnecessary to indulge in any detailed discussion relative to the question of damages. We are satisfied, however, that the verdict was excessive. According to plaintiffs' own admissions, the meats claimed to have been spoiled, as shown by the inventory compiled by the deputy sheriff in the presence of John Chrenka, and admitted by the latter to be correct, the total meats on hand, including sausage, bacon and lard, was 147½ pounds, which at the average value of twenty cents a pound, testified to by Chrenka, made a total damage of $29.50, or placing the weight of the meats at 155 pounds, as stated by plaintiff Chrenka, the total value of the meats spoiled at an average value of twenty cents a pound, amounted to $31. It is admitted by plaintiffs that all the items of personal property levied upon were returned to them, and it is difficult to justify the verdict of the jury and judgment of the court in the amount of $1,000.

The only other major point advanced by defendant to reverse the judgment is that the following remarks made in the closing argument of plaintiffs' counsel were improper and prejudicial:

"Mr. Kabaker: And this plaintiff (meaning Ricar) guaranteed to the Sheriff, 'If you, the Sheriff, are held liable for any damage by reason of the levy you made * * *, we, the plaintiffs, will indemnify you, the Sheriff, against loss.' Let him indemnify the Sheriff against loss. He has indemnity up with the Sheriff against any such thing as this.

Mr. Mason (defense counsel): I object to that.

The Court: Overruled.

Mr. Kabaker (continuing): Here is an agreement to indemnify the Sheriff. Now let them indemnify the Sheriff. I say the Sheriff took a chance on this levy; upon damaging this man. But he said, 'What difference does it make to me? I have the guaranty of the plaintiff, so all I do if I get stuck, the plaintiff will take care of me. * * *' Whatever you find against the Sheriff the plaintiff

At any rate, the [illegible] in [illegible] importance seems the ratio of less [illegible] to [illegible] the jury to find that the levy, which [illegible] by the [illegible] to have been lawfully made and [illegible] by [illegible] to have been, to be unlawful.

Inasmuch as the cases will have to be retried, we deem it unnecessary to [illegible] in any [illegible] discussion relative to the question of damages. We are satisfied, to wit, that the verdict was excessive. According to plaintiff's own admissions, the assets claimed to have been seized, as shown by the inventory compiled by the deputy sheriff in the [illegible] of [illegible], and admitted by the latter to be correct, the [illegible] on hand, including sausage, bacon and lard, [illegible] with a [illegible] average value of twenty cents a pound, [illegible] by [illegible], made a total damage of [illegible], or [illegible] the weight of the meats at 155 pounds, as stated by plaintiff [illegible]. The total value of the meats supplied as an [illegible] of [illegible] cents a pound, amounted to $31. It is admitted by plaintiff that all the items of personal property levied upon were returned [illegible], and it is difficult to justify the verdict of the [illegible] court in the amount of $1,000.

The only other major point advanced by [illegible] to reverse the judgment is that the [illegible] ment of plaintiff's counsel were improper [illegible]

"Mr. Kabelar: [illegible] to the Sheriff, [illegible] damage by reason of the levy [illegible] will indemnify [illegible] the Sheriff against any such thing as this.

Mr. Moran (continuing): I object [illegible].

The Court: [illegible].

Mr. Kabelar (continuing): [illegible] the Sheriff. Now let them indemnify the Sheriff. I say the Sheriff took a chance on this levy; upon inserting this man. But he said, 'Not different from it takes to me.' I say the [illegible] of the plaintiff, so all I do is [illegible] stuck, the plaintiff will take care of me. * * * Whatever you find against the Sheriff the plaintiff

(in execution) will have to pay back to the Sheriff. So you needn't worry that you are hooking the Sheriff that obtained possession. It isn't the concern of the Sheriff, but of the man who made the levy in the first instance.

Mr. Mason: I object to that argument.

The Court: Overruled."

Plaintiffs' counsel seeks to justify this line of argument because of the indemnity contained in exhibit 7-C, which consisted of a letter to the sheriff requesting the appointment of one Batista as custodian of the property in question. This exhibit was admitted in evidence by agreement of counsel. Notwithstanding the admission of the exhibit by agreement, we regard that line of argument improper and misleading to the jury. It presented to them an issue which was irrelevant and immaterial to a proper decision of the cause. As was said in the case of City of Chicago v. Wright & Lawther Oil & Lead Co., 14 Ill. App. 119, at p. 125:

"Whether the city was indemnified or not was wholly immaterial, either as to the plaintiff's cause of action or to the amount of damages to which it was entitled. To argue to the jury that the city was indemnified by the railroad company, so that whatever damages they should award would not come out of the taxpayers, but would have to be paid by the railroad company, * * * was an improper consideration. Its inevitable tendency was to make them (to say the least) less circumspect in estimating the actual loss occasioned by the injury complained of. * * * The jury could not forget when considering of their verdict that it was the railroad company and not the city that was to pay the damages; and it is a reasonable inference that this consideration had its influence in their deliberations."

For the reasons indicated, the judgment of the circuit court should be reversed and the cause remanded for a new trial, and it is so ordered.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

(in exception, will have [illegible]). You need't worry that you are holding the Negro that questioned possession. It isn't the concern of the [illegible] of the man who made the levy in his first instance.

Mr. Mason: I obj[illegible] argument.

The Court: Overruled.

Plaintiff's counsel seems to [illegible] this line of argument because of the indemnity contained in exhibit [illegible] letter to the sheriff requesting the replevin [illegible] as custodian of the property in question. This [illegible] admitted in evidence by agreement [illegible] the admission of the exhibit [illegible] line of argument improper and misleading to the jury. [illegible] to them an issue which was irrelevant and immaterial to [illegible] decision of the cause. [illegible]

v. Wright & Lawther Mill & Lumb Co., 14 [illegible] 1[illegible]:

"Whether the city was indemnified [illegible] immaterial, either as to the validity [illegible] the amount of damages to which it was [illegible]. It was for the jury that the city was indemnified [illegible] so that whatever damages they should award [illegible] of the bonds, but could have no [illegible] the defendant company. * * * was an improper [illegible]. It invited the tendency was to make them [illegible] in estimating the actual loss [illegible] of. * * * The jury could not [illegible] verdict that it was the [illegible] was to pay the [illegible] this consideration [illegible]."

For the reasons indicated, the judgment [illegible] court should be reversed [illegible] and it is so ordered.

[illegible]

Scanlan, P. J., and Mullin[illegible], J., concur.

38469

HOBART BROTHERS COMPANY,
a corporation,
Defendant in Error,

v.

LOUIS G. TATTER, JOHN DOE and
MARY DOE,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

285 I.A. 594

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against Louis G. Tatter, John Doe and Mary Roe to recover possession of certain personal property claimed to have been wrongfully taken and detained by defendants. The cause was tried by the court and a jury, resulting in a directed verdict and judgment for plaintiff at the close of all the evidence.

The affidavit for replevin alleged that plaintiff was the owner and lawfully entitled to the possession of one 300 ampere portable Arc Welder, with motor and accessories, valued at $499.61; that defendants wrongfully took and detained same from plaintiff, and that the chattels were not taken for any tax, assessment or fine levied by virtue of any law of this State against plaintiff's property, nor seized under any execution or attachment against plaintiff's goods.

Louis G. Tatter's affidavit of defense denied that he unlawfully and wrongfully took possession and detained the welder described in the affidavit of replevin, and averred that he had purchased this machinery and paid for it and that in addition thereto plaintiff owed him $468.10, which was claimed as his

38409

HOBART BROTHERS COMPANY,
a corporation,
Defendant in error,

v.

LOUIS G. TATTER, JOHN DOE and
MARY DOE,
Plaintiffs in error.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against Louis G. Tatter, John Doe and Mary Doe to recover possession of certain personal property claimed to have been wrongfully taken and detained by defendants. The cause was tried by the court and a jury, resulting in a directed verdict and judgment for plaintiff at the close of all the evidence.

The affidavit for replevin alleged that plaintiff was the owner and lawfully entitled to the possession of one 300 ampere portable Arc Welder, with motor and accessories, valued at $499.61; that defendants wrongfully took and detained same from plaintiff, and that the chattel [illegible] tax, assessment or fine levied by virtue of any [illegible] State against plaintiff's property, nor held under any execution or attachment against plaintiff's goods.

Louis G. Tatter's [illegible] testimony tended to show that he unlawfully and wrongfully took possession of the welder described in the affidavit of replevin, [illegible] that he had purchased this machinery and parts [illegible] in addition thereto plaintiff owed him $408.10, which was delinquent as his

set-off. It was further averred that no demand was ever made for the chattels sought to be replevied, and that plaintiff was not entitled to file suit in this State because it had not qualified as a foreign corporation to do business or sell property in Illinois.

It appears from the evidence that plaintiff, an Ohio corporation, sold the machinery in question to Tatter under a conditional sales contract for the stipulated sum of $1,070. Tatter paid $160 cash and agreed to pay the balance in monthly installments of $70, with 6% interest. The last installment payment was made in November, 1931. When the affidavit for replevin was filed in May, 1933, Tatter was clearly in default, and under the terms of the conditional sales contract plaintiff was entitled to possession of the property.

After plaintiff had filed its replevin bond a deputy bailiff of the municipal court seized the property and delivered it to plaintiff, who took possession thereof. Prior thereto plaintiff had contracted with the Morrison Railway Supply Corporation, Chicago, to rent them an electric arc welder and had delivered such welder to be used on a viaduct on which the Morrison concern was doing some construction work in Chicago. The rented welder did not operate properly, and plaintiff thereupon temporarily substituted the replevied welder until the rented machinery could be replaced or repaired. Tatter, learning that the replevied welder was being used by the Morrison company, seized the same and in connection with the instant proceeding a petition was filed in the municipal court for contempt proceedings against him by reason of this seizure.

The principal defense interposed by defendants, as appears from their own brief, is as follows:

"Defendants' theory is that plaintiff, a foreign corporation doing business in Illinois, cannot maintain this action

set-off. It was further evident that no demand was ever made for the chattels sought to be replevied, and that plaintiff was not entitled to file suit in this State because it was not qualified as a foreign corporation to do business or sue generally in Illinois.

It appears from the evidence that plaintiff, an Ohio corporation, sold the machinery in question to Tatter under a conditional sales contract for the stipulated sum of $1,[illegible]. Tatter paid $100 cash and agreed to pay the balance in monthly installments of $70, with 6% interest. The last installment payment was made in November, 1931. When the attempt to replevin was filed in May, 1933, Tatter was clearly in default, and the terms of the conditional sales contract [illegible] to possession of the property.

After plaintiff had filed its replevin bond, a deputy sheriff of the municipal court seized the property and delivered it to plaintiff, who took possession thereof. Prior thereto plaintiff had contracted with the Morrison Milling Supply Corporation, Chicago, to rent them an electric arc welder and [illegible] such welder to be used on a viaduct on which the Morrison concern was doing some construction work in Chicago. The rented welder did not operate properly, and plaintiff thereupon [illegible] substituted the replevied welder until the rented machinery could be repaired or repaired. Tatter, learning that the replevied welder was being used by the Morrison company, seized the same and in connection with the instant proceeding a petition was filed in the municipal court for contempt proceedings against [illegible] by reason [illegible].

The principal defense interposed by defendants, as appears from their own brief, is as follows:

"Defendants' theory is that plaintiff, a foreign corporation doing business in Illinois, cannot maintain this action

without complying with the foregoing statute; that plaintiff is bound by the admissions contained in its pleadings and cannot deny that it is a foreign corporation, and that it is doing business in this state, and that it has failed to show compliance with said statute."

It is conceded that plaintiff is a foreign corporation and that the authorities construing sec. 94, chap. 32, Cahill's 1931 Illinois Revised Statute, in effect at the time this suit was instituted, hold that no foreign corporation doing business in this State without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this State arising out of either contract or tort. To support their contention that plaintiff was "doing business" in this State, defendants rely on plaintiff's petition alleging that it is an Ohio corporation, together with two affidavits filed in support thereof. We have examined the petition and affidavits, and find nothing therein to justify defendants' position. While it is true that plaintiff instituted and was prosecuting a replevin suit in this State, it has been held that the words "doing business," and "transacting business," as used in the statute regulating foreign corporations "have by numerous judicial decisions been given a settled and recognized meaning, and refer only to the transaction of the ordinary business in which the corporation is engaged, and do not include acts not constituting any part of its ordinary business, such as instituting and prosecuting actions in courts." (Alpena Cement Co. v. Jenkins & Reynolds, 244 Ill. 354, wherein are cited numerous other cases, including Spry Lumber Co. v. Chappell, 184 Ill. 539; Mandel v. Swan Land Co., 154 Ill. 177; Faxon Co. v. Lovett Co., 60 N. J. L. 128; 13 Am. & Eng. Ency. of Law (2nd ed.) 869.)

It has also been held that a foreign corporation may solicit business through agents in this State, where the contracts are consummated in the home state of the foreign corporation; that it may maintain an office for that purpose, and that such transactions

without complying with the [illegible] bound by the admissions contained in the pleadings on demurrer that it is a foreign corporation, and hence is [illegible] business in this state, and that it has [illegible] with said statutes."

It is conceded that [illegible] authorities construing [illegible] Revised Statutes, [illegible] hold that no foreign corporation [illegible] a license shall be permitted [illegible] in any of the courts of this [illegible] text. To support their contention [illegible] ness" in this State, defendants rely on plaintiff's pleading [illegible] that it is an Ohio corporation, [illegible] in support thereof. We have examined the pleadings and affidavits, and find nothing therein to justify [illegible] is true that plaintiff incorporated and was [illegible] suit in this State, it has been held that the words "doing business" and "transacting business" as used in the [illegible] corporations "have by numerous judicial decisions been given [illegible] and recognized meaning, and refer only to the transaction of the ordinary business in which the corporation is engaged, and do not include acts not constituting any part of its ordinary business, such as instituting and prosecuting actions in courts." (Citing [illegible] v. Jenkins & Reynolds, [illegible] cases, including [illegible] Swan Land Co., 134 Ill. 179; [illegible] v. [illegible] 13 Am. & Eng. Ency. of Law (2nd ed.) 809.)

It has also been held that a foreign corporation may sell its business through agents in this State, have its contracts [illegible] consummated in the home state of the [illegible] maintain an office for that purpose, and the [illegible] such transactions

will not constitute "doing business" within this State. It was said in Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, at p. 333:

"It would be manifestly illogical to hold that a foreign corporation engaged in interstate commerce was exempt from all those provisions of the act imposing conditions upon the right to do business in the State, yet such corporation might nevertheless be penalized by denying it access to our State courts. A penalty ought not to be imposed upon foreign corporations for a failure to comply with a statute that has no application to them."

In American Art Works v. Chicago Picture Co., 184 Ill. App. 502 (affirmed 264 Ill. 610), plaintiff's principal office was located in Ohio, where it manufactured all its goods. It had an office for the use of its salesmen in Chicago, but the only business ever done in Illinois was the solicitation of orders by its agents. The orders obtained were forwarded to its home office for acceptance or rejection. The collection of accounts was made in Ohio. The particular transaction involved in that proceeding related to contracts solicited by Chicago salesmen and transmitted to plaintiff's home office, and there accepted. In discussing the question under consideration the court said: (p. 503, 504)

"From a consideration of these facts we have concluded that plaintiff was not doing business within the purview of the statute above referred to, and hence the statute has no application. The foregoing facts bring the case within the reasoning and conclusion of the Supreme Court in Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, in which opinion the rule under consideration is discussed at length, with copious quotations from many other cases. In that case it was held that corporations engaged in interstate commerce are not amenable to the provisions of the act above referred to, and hence by the very language of the act itself are excluded from its operation."

In Young v. Meyer-Rudolph Shoe Co., 261 Ill. App. 327, under facts similar to the case of American Art Works v. Chicago Picture Co., supra, it was held that a foreign corporation has a right to transact interstate commerce and to obtain business through agents in this State where the contracts are finally consummated in the home state of the corporation.

On the conditional sales contract executed by defendant Tatter, upon which plaintiff's claim of title to the chattels replevied is

will not constitute doing [illegible] in Illinois. It was said in Lehigh Portland Cement Co. v. Hennen, [illegible], 334 p. 332:

"It would be practically like local [illegible] corporation engaged in interstate commerce [illegible] all those provisions of the act upon which [illegible] to do business in the state, yet such [illegible] therefore be permitted by changing its [illegible] A penalty ought not to be imposed [illegible] a failure to comply, [illegible]."

In American Ice Cream v. [illegible], [illegible] 502 (affirmed [illegible]), plaintiff [illegible] in Ohio, where it manufactured [illegible] the use of its milk [illegible] in Illinois [illegible] obtained were [illegible] tion. The collection or [illegible] transaction involved in [illegible] by Chicago officers and [illegible] there accepted. In [illegible] court said: (p. 504, 506)

"[illegible] that plaintiff was not [illegible] statute above referred to, [illegible] The foregoing facts [illegible] clusion of the [illegible] Molean, 245 Ill. 326, in which opinion [illegible] is discussed at length. [illegible] cases. In that case it [illegible] interstate commerce [illegible] above referred to, [illegible] itself are [illegible]."

In Young v. Meyer-Blanke [illegible], [illegible], under facts similar to the case of [illegible] v. [illegible] Co., supra, it was held that [illegible] transact interstate commerce [illegible] in this state where the [illegible] home state of the corporation.

On the conditional sales contract executed by defendant Tatte upon which plaintiff's claim of title to the chattels replevied is

based, appears the notation, "accepted at Troy, Ohio, on October 27, 1931. Hobert Brothers Company, by D. C. Jenkins, Credit Mgr." No evidence was introduced to overcome this proof, and it will therefore be presumed that the contract did not become effective until it was accepted by plaintiff at Troy, Ohio. Moreover, the contract, which is dated October 24th, is addressed to plaintiff at Troy, Ohio, and requests it to ship to defendant by freight the arc welder involved. The acceptance by plaintiff of the contract did not take place until three days later. From these facts it would appear that while the contract was solicited in the State of Illinois, it was consummated in Ohio and was treated by the parties as a transaction in interstate commerce. These circumstances, together with the fact that the seller resided in Ohio, the chattel was shipped from Ohio, and as heretofore stated the contract was accepted in Ohio, would seem clearly to stamp the transaction as one within the purview of the authorities heretofore cited. We therefore conclude that the defense interposed, namely, that plaintiff was an unlicensed foreign corporation "doing business" in the State of Illinois, was not sustained by the evidence, and that plaintiff had the legal right to maintain its replevin action in the courts of this State.

It is urged that the court erred in excluding evidence of acts relied on by defendants to support the defense that plaintiff is an unlicensed foreign corporation doing business in this State. This evidence related to a single isolated transaction, and involved the leasing of a welder to the Morrison company during the pendency of this action. We think the court properly excluded the evidence, not only because an isolated transaction is not sufficient to constitute "doing business" within the statute, (Alpena Cement Co. v. Jenkins & Reynolds, supra), but also because the transaction sought to be shown occurred after the commencement of this proceeding.

based, apparently [illegible] 27, 1921. Robert [illegible]
No evidence was [illegible]
therefore be presumed that the [illegible] until it was accepted by plaintiff at [illegible] contract, which is [illegible]
at Troy, [illegible] the arc welder involved. [illegible] tract did not take place until [illegible] it would appear that while [illegible] of Illinois, it was [illegible] parties as a transaction in interstate commerce. [illegible] stances, together with the fact that [illegible] the chattel was shipped [illegible] contract was negotiated in Ohio, and [illegible] transaction as one within [illegible] fore cited. [illegible] namely, that plaintiff [illegible] business" in the State of Illinois, [illegible] dence, and that defendant's [illegible] topelvin action in the State of Ohio.

It is urged that the [illegible] acts relied on by the [illegible] is an unknown for [illegible] This evidence [illegible] volved the [illegible] pendency of this [illegible] evidence, but [illegible] to constitute [illegible] v. Jenkins [illegible] sought to be [illegible] brought to the commencement of this proceeding

Lastly, it is urged that the court refused defendants the opportunity to prove their set-off, which was based on rental of space by plaintiff in defendants' building, stenographer, telephone and storage charges, and various other items, aggregating $888.40. The court excluded this evidence on the theory that a plea of set-off is not proper in an action of replevin, and we think properly so. Replevin is a possessory action, and the only issue involved is the right to the possession of the chattel in question. Therefore, the admission of such evidence would have been erroneous. (General Motors Acceptance Corp. v. Vaughn, 358 Ill. 541, 548; Checker Taxi Co. v. Turkington, 273 Ill. App. 112; Fairbanks v. Malloy, 16 Ill. App. 277; 54 Corpus Juris, 418.)

Since there was no competent evidence offered on behalf of defendants to sustain their defense to the action of replevin, we are of the opinion that the court properly directed a verdict in plaintiff's favor at the close of all the evidence. During the pendency of this cause plaintiff moved to strike the bill of exceptions from the record, and to dismiss the writ of error. This motion was reserved to the hearing, and will now be denied.

Finding no convincing reasons for reversal, the judgment of the municipal court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

Lastly, it is urged that the [illegible] (Judgment) the opportunity to prove their set-off, which [illegible] on rental of space for plaintiff's advertisement with the [illegible], telephone and storage charges, and various other items, as [illegible] §588.[illegible]. The court concluded that evidence on the [illegible] plea of set-off is not proper in an action [illegible] which proceed, [illegible] issue involved is the right to the possession of [illegible] in question. Therefore, the [illegible] such evidence [illegible] have been erroneous. (Gurnsel Motors [illegible] v. [illegible], [illegible] III. 541, 544; Jackson [illegible] v. [illegible], [illegible] Fairbanks v. Malloy, 16 Ill. App. 277; [illegible], [illegible]

Since there was no [illegible] evidence [illegible] on behalf of defendants to sustain their defense to the action of [illegible], we are of the opinion that the court properly [illegible] in plaintiff's favor at the close of all the evidence. [illegible] pendency of this cause plaintiff may [illegible] the [illegible] exceptions from the record, [illegible] motion was reserved to [illegible], it will [illegible].

Finding no substantial reasons for reversal, the [illegible] of the municipal court [illegible].

[illegible]

Cornelsen, [illegible], and Sullivan, [illegible], concur.

38534

PHILIP A. NAUGHTON,
Appellant,

v.

J. S. BACHE, E. WISE, N. KAHN,
F. J. MURPHY, A. F. RODERICK,
L. S. BACHE, HAROLD S. BACHE,
W. F. STERN, F. L. RICHARDS and
JOSEPH P. GRIFFIN, partners as
J. S. Bache & Co.,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

285 I.A. 594

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort, claiming damages for fraudulent misrepresentations inducing the sale of bonds by defendants as partners of J. S. Bache & Company. Judgment was entered for defendants pursuant to a directed verdict, and plaintiff appeals.

The declaration alleged that in September, 1925, plaintiff was induced to purchase $20,000 worth of bonds issued by the Orchard Coal Co., upon the representation that the Orchard Coal Co. and its subsidiaries, Scranton Coal Mining Co. and Lake & Export Coal Sales Corporation of Illinois, had at that time fixed properties amounting to $1,458,628.34, current assets of $489,038.28 and current liabilities amounting to $442,957.91; that Orchard Coal Co. owned a mine having a daily output of 1500 tons of coal, and controlled the Scranton Coal Mining Company, which had mining property with a daily capacity of 2500 tons of coal; that Lake & Export Coal Sales Corporation had at all times $200,000 quick assets and normal earnings of $50,000 to $100,000 per annum; that the total earnings before interest of the Orchard Coal Co. from its operations

38534

PHILIP A. MAUGHTON,
Appellant,

v.

I. S. RAKER, E. [illegible], N. [illegible],
F. I. MURPHY, A. F. [illegible],
H. S. BACHE, HAROLD S. BACHE,
W. F. STREET, A. L. MICHAMES and
JOSEPH P. GRIFFIN, partners as
I. S. Bache & Co.,
Appellees.

APPEAL FROM SUPERIOR
COURT, [illegible].

MR. JUSTICE MICHEL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort, claiming damages for fraudulent misrepresentations in using the sale of bonds by defendants as partners of I. S. Bache & Company. Judgment was entered for defendants pursuant to a directed verdict, and plaintiff appeals.

The declaration alleges that in [illegible], 1926, plaintiff was induced to purchase $20,000 worth of bonds issued by the Orchard Coal Co., upon the representation that the Orchard Coal Co. and its subsidiaries, Cranston Coal Mining Co. and Lake & Export Coal Sales Corporation of Illinois, had at that time fixed properties amounting to $1,480,000.00, current assets of $[illegible],[illegible],[illegible] and current liabilities amounting to $[illegible],[illegible],[illegible]; that Orchard Coal Co. owned a mine having a daily output of 1500 tons of coal, and controlled the Cranston Coal Mining Company, which had mining property with a daily capacity of [illegible] tons of coal; that Lake & Export Coal Sales Corporation had at all times $[illegible],000 quick assets and normal earnings of $50,000 to $100,000 per annum; that the total earnings before interest of the Orchard Coal Co. from its operations

and accruing by reason of its ownership of 100% of the stock of the Lake & Export Coal Sales Corporation, and 49.9% of the stock of the Scranton Coal Mining Company, for the fiscal years ending March 31, 1923, and March 31, 1934, were $162.124.94.

It was alleged that in pursuance of the foregoing representations plaintiff purchased from defendants bonds of the Orchard Coal Co., as follows: September 17, 1925 - bonds to the amount of $10,000; September 22, 1925 - bonds to the amount of $3,000; and on September 29, 1925 - bonds to the amount of $7,000, for which he paid the aggrogate amount of $20,016.17; that the representations were false in that the Orchard Coal Co., and its subsidiaries had fixed properties valued at $300,000, instead of $1,458,628.34, current assets to the amount of $100,000, instead of $489,038.28, and current liabilities to the extent of $700,000 instead of $442,957.91; that the Orchard Coal Co. owned a mine having a daily output of, to-wit, no tons of coal, instead of 1,500 tons; that it had property with a daily capacity of, to-wit, no tons, instead of 2,500 tons of coal; and Lake & Export Coal Sales Corporation had at all times assets of, to-wit, no dollars, instead of $200,000, and normal earnings of, to-wit, no dollars, instead of $50,000 to $100,000 per annum; that the total earnings before interest of the Orchard Coal Co. from its operations, and accruing by reason of its ownership of 100% of the stock of the Lake & Export Coal Sales Corporation, and 49.9% of the stock of the Scranton Coal Mining Co. for the fiscal years ending March 31, 1923, and March 31, 1924, were, to-wit, no dollars, instead of $162.124.94. It is averred that when defendants made these representations they knew them to be false and made them with the intention of having plaintiff rely thereon in making said purchases, and that plaintiff did not know that the representations were false and relied thereon.

Defendants' answer admits the purchase of the bonds; denies

and accruing by reason of its operations on [illegible] in stock of the Lake & Export Coal Sales Corporation, and [illegible] of the stock of the Scranton Coal Mining Company, for the fiscal years ending March 31, 1923, and March 31, 1924, were $[illegible].

It was alleged that in purchase of the [illegible] representations plaintiff purchased from defendants bonds of the Orchard Coal Co., as follows: September 17, 1923 - bonds to the amount of $10,000; September 22, 1923 - bonds to the amount of $[illegible]; and on September 29, 1923 - bonds to the amount of $[illegible], for which he paid the aggregate amount of $[illegible]; that the representations were false in that the Orchard Coal Co., and the subsidiaries [illegible] property valued at $300,000, instead of $1,[illegible], current assets to the amount of $[illegible], instead of $[illegible], and current liabilities to the extent of $[illegible] instead of $[illegible]; that the Orchard Coal Co. owned a mine having a daily capacity of [illegible] tons of coal, to-wit, no tons of coal, instead of 1,[illegible]; that it had property with a daily capacity of, to-wit, no tons, instead of [illegible] tons of coal; and Lake & Export Coal Sales Corporation [illegible] assets of, to-wit, no dollars, instead of $[illegible], and normal earning of, to-wit, no dollars, instead of $[illegible] to $[illegible]; that the total earnings before interest of the Orchard Coal Co. from its operations, and accruing by reason of its ownership of [illegible] of the stock of the Lake & Export Coal Sales Corporation, and [illegible] of the stock of the Scranton Coal Mining Co. for the fiscal years ending March 31, 1923, and March 31, 1924, were, to-wit, no dollars, instead of $182,124.94. It is averred that when defendants made these representations they knew them to be false and made them with the intention of deceiving plaintiff and induced him in making said purchases, and that plaintiff did not know that the representations were false and relied thereon.

Defendants' answer admits the purchase of the bonds; denies

that they made any false representations to plaintiff with the intention of having him rely thereon in making said purchases, or that they knew the representations alleged by plaintiff to have been false or made with the intention of having plaintiff rely thereon, or that plaintiff did rely upon any of the representations charged. Defendants further deny that the bonds of the Orchard Coal Co. were worthless at the time of the purchase and that plaintiff was damaged.

The facts disclose that these bonds were sold to plaintiff by Mr. Allen of the bond department of J. S. Bache & Co. There is no contention that Allen had any personal knowledge of the affairs of the Orchard Coal Co., and it is conceded that whatever representations he made are contained in a printed circular introcuced in evidence as Exhibit 1, which consisted of a letter signed by D. S. Gent, president of the Orchard Coal Co., setting forth in separate paragraphs facts relating to the business and properties of the company and the security of the mortgage bonds. It was represented in the letter that the company had assets of $1,458,000, and current liabilities of $489,000; that its earnings were 2-1/3 times more than the interest charges on the bonds; that it had clear title to coal rights in fee to a total of 2167.22 acres, in addition to 35.24 acres of surface lands suitable for shaft and mine building, with a potential daily output of 1,500 tons and a capacity for development of 3,500 tons; that the company also controlled the Scranton Coal Mining Co., with a daily capacity of 2,500 tons, and the Lake & Export Coal Sales Corporation, which was engaged in marketing the Scranton mines, as well as the output of several other large mines, and had at all times $200,000 quick assets and normal earnings of $50,00 to $100,000 per annum. Appended to the president's letter was a consolidated balance sheet of the three companies and a statement that the legality of the bonds had been approved by Chapman, Cutler & Parker, attorneys in Chicago. On the

that they made any false representations to plaintiff with the intention of having him rely thereon in making said purchase, or that they knew the representations alleged by plaintiff to have been false or made with the intention of having plaintiff rely thereon, or that plaintiff did rely upon any of the representations charged. Defendants further deny that the bonds of the Orchard Coal Co. are worthless at the time of the purchase and that plaintiff has suffered damage.

The facts disclose that these bonds were sold to plaintiff by Mr. Allen of the bond department of [illegible] & Co. There is no contention that Allen had any personal knowledge of the affairs of the Orchard Coal Co., and it is conceded that [illegible] representations he made are contained in a print [illegible] introduced in evidence as Exhibit 1, which consisted of a letter signed by [illegible], President of the Orchard Coal Co., setting forth in [illegible] facts relating to the business and property of [illegible] company, including the mortgage bonds. It was represented in the letter that the company had assets of $1,688,[illegible], and current liabilities of [illegible], that its earnings were 2-1/3 times more than the interest [illegible] the bonds; that it had clear title to coal rights [illegible] of 2167.22 acres, in addition to [illegible] acres of [illegible] for shaft and mine building, with a potential [illegible] and a capacity for development of [illegible] controlled the Scranton Coal Mining Co., [illegible] 2,500 tons, and the Lake & Export Coal Sales Corporation, which was engaged in marketing the Scranton mines, as well as the output of several other large mines, and had at all times [illegible] and normal earnings of $50,000 to $100,000 per annum. Appended to the president's letter was a consolidated balance sheet of the three companies and a statement that the legality of the bonds had been approved by Chapman, Cutler & Parker, attorneys in Chicago. On the

bottom of the front page of the circular appeared the following:

> "All statements herein are official and are based on information which we regard as reliable, and while we do not guarantee them, we ourselves have relied upon them in the offering of this security."

In addition to the information contained in the printed circular, and in response to plaintiff's inquiry Allen informed plaintiff that the output of the mines was sold to large industrial concerns, railroads and utility companies of recognized standing.

It appears from the evidence that several weeks after the purchase of the bonds Allen called plaintiff to the office of J. S. Bache & Co., and suggested that he exchange the Orchard Coal Co. securities for the new issue, bonds of the Standard Coal & Coke Co., because the latter was a stronger and better concern. The exchange was made and plaintiff was paid the difference of $1,080. Some three weeks later plaintiff advised Allen that he had heard that the bonds of the Orchard Coal Co. and of the Standard Coal & Coke Co. were worthless, that the mines were closed down and no coal had been mined for a long time. About two weeks after plaintiff again called on Allen and told him that he had been down to the Orchard Coal mines and had learned from Mr. Janes, the foreman in charge, that the company was involved in foreclosure proceedings and had not shipped any coal for eight months and owed the miners large sums of money for wages. Plaintiff testified that Allen then advised him that Standard Coak & Coke Co. was putting out $300,000 in notes and that if it was known "down the street" they were bankrupt, J. S. Bache & Co. would not be able to sell the notes, and Allen suggested that if plaintiff would "lie low for a week" he would receive his money back; that after waiting a week plaintiff again complained to Allen, who told him to be patient and wait another week; that he thereafter complained to Mr. Curran, one of the officials of Bache & Co., telling him that he found out about the condition of the

bottom of the front page of the circular appeared the following:

> "All statements herein are official and are based on information which we regard as reliable, but while we do not guarantee them, we ourselves have relied upon same in the offering of this security."

In addition to the information contained in the prospectus officially, and in response to plaintiff's inquiry, Allen informed plaintiff that the output of the mines was sold to large industrial plants, railroads and utility companies on a contract basis.

It appears from the evidence that [illegible] the purchase of the bonds Allen called plaintiff [illegible] to the office of J. T. Burke & Co., and suggested that he [illegible] securities for the new issue, bonds of the Standard Coal Co., because the latter was a subsidiary [illegible]. The exchange was made and plaintiff [illegible] $1,000. Some three weeks later plaintiff [illegible] that the bonds of the Standard Coal Co. [illegible] Coke Co. were worthless, that the mines [illegible] no coal had been mined for a long time. Soon [illegible] later plaintiff again called on Allen and told him that he [illegible] to the Standard Coal mines and had learned from Mr. [illegible], the foreman in charge, that the company was involved in [illegible] and had not shipped any coal for eight months and owed the miners large sums of money for wages. Plaintiff [illegible] that Allen advised him that Standard Coal & Coke Co. was [illegible] in notes and that if it was known "down the street" they would [illegible], J. S. Burke & Co. would not be able to sell the notes. Mr. Allen suggested that if plaintiff would "hie low for a week" he could receive his money back; that after waiting a week plaintiff again complained to Allen, who told him to be patient and wait another week; that he thereafter complained to Mr. Durham, one of the officials of Burke & Co., telling him that he found out about the condition of the

Orchard Coal Co. and wanted his money back, and that Curran promsied to let plaintiff hear from him, but never did so; that afterward plaintiff complained to Mr. Griffin, one of the defendants, telling him that he had learned of the misrepresentations made, that the mines were closed and the company bankrupt, whereupon Griffin likewise promised to let plaintiff hear from him, but failed to do so; that he again called on Griffin, some time later, and brought with him the printed circular containing the representations complained of and called his attention to the fact that the mines had been closed for eight months; that the company owed $95,000 on its notes and $335,000 on current expenses and new equipment which had been installed in the mines, and plaintiff states that Griffin admitted to him that he knew the bonds were worthless and that Allen had no right to sell them; that when plaintiff told Griffin he had depended on the information contained in the circular Griffin answered that if the information were true the bonds would be worth what plaintiff had paid for them.

It is first urged as grounds for reversal that the court misconceived the rule of law applicable to actions based on fraudulent misrepresentations and in directing a verdict in favor of defendants, invoked the legal principle that "one who qualifies his representation by language indicating that it is made merely on information and belief is not liable for its falsity;" whereas, the correct principle, as contended for by plaintiff, is "that one who qualifies his representation by language indicating that it is made merely on information and belief, and who honestly believes such representations to be true, is not liable for its falsity."

Plaintiff's case was predicated upon the allegation that certain facts contained in the printed circular were false, and known by defendants to be false. The rule is well settled that an action for fraud and deceit must show six elements in order to afford relief: (1) The misrepresentation must be in form a statement of fact; (2)

Orchard Coal Co., and landed in Kentucky [illegible] and [illegible] promised to let plaintiff hear from him, but never [illegible] that [illegible] plaintiff complained to Mr. Griffin, one of the defendants, telling him that he had learned of his misrepresentation [illegible], that the mines were closed and the company bankrupt, [illegible] Griffin [illegible] promised to let plaintiff hear from him, but failed to do so; that he again called on Griffin, some time later, and [illegible] with him the printed circular containing the representations complained of and called his attention to the fact that [illegible] for eight months; that the company owed [illegible] on its notes and [illegible] on current expenses and new equipment [illegible] in failing in the mines, and plaintiff stated that Griffin [illegible] that he knew the bonds were worthless and that [illegible] that when plaintiff told Griffin he had [illegible] in connection contained in the circular Griffin answered [illegible] the information were true the bonds would be worth what [illegible].

It is first urged on behalf of the defendants that the court misconceived the rule of law applicable to actions based on fraudulent misrepresentations and in directing a verdict in favor of the plaintiff, involved the legal principle that "one who [illegible] his own misrepresentation by language indicating that it is merely an information and belief is not liable for it." [illegible] of plaintiff, [illegible] contended for by plaintiff, is "that one who [illegible] his representation by language indicating that it is made merely on information and belief and who honestly believes such representation to be true, is not liable for its falsity."

Plaintiff's case was [illegible] upon the allegation that certain facts contained in the printed circular were false, and known by defendants to be false. The rule is well settled that an action for fraud and deceit must show six elements in order to afford relief: (1) The misrepresentation must be in form a statement of fact; (2)

It must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; and (6) the statement must be material. (Johnson v. Shockey, 335 Ill. 363, 366; Krankowski v. Knapp, 268 Ill. 183, 190.) Applying these principles to the proof adduced by plaintiff, we conclude that he failed to prove the charges made in his declaration. Many of the representations complained of were mere matters of opinion and not representations of fact. It is first alleged that defendants represented that the Orchard Coal Co. had fixed properties amounting to $1,458,628.34, and current assets amounting to $489,038.28. There is nothing in the record to show that these values were incorrect. And the same is true of the representation that the current liabilities of the Orchard Coal Co. amounted to $442,957.91. Another representation complained of is that the company owned a mine having a daily output of 1,500 tons, but no proof was made of the falsity of this representation. It is also alleged that defendants represented the Orchard Coal Co. as controlling the Scranton Coal Mining Co., which had mining properties with a daily output of 2,500 tons, but plaintiff offered no proof to show that the Orchard Coal Co. did not control the Scranton Company, or that the latter did not have mining property of the daily capacity represented. With reference to the Lake & Export Coal Sales Corporation, it is urged that defendants represented that it had $200,000 quick assets. Defendants contend that this was a mere matter of opinion, but regardless of that question no proof was offered to the contrary. It is also alleged that defendants represented the Lake & Export Coal Sales Corporation to have normal earnings of $50,000 to $100,000 per annum, but proof is lacking to show the falsity of that statement. Finally, it is alleged that defendants represented the total earnings of the Orchard Coal Co. for the two fiscal years ending

It must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; and (6) the statement must be material. Johnson v. Hockey, 58 N.B. 362, 364; Krankowski v. Kemp, 23 N.B. 134, 138.) Applying these principles to the proof adduced by plaintiff, we conclude that he failed to prove the charges made in his declaration. Many of the representations complained of were mere matters of opinion and not representations of fact. It is first alleged that defendants represented that the Orphard Coal Co. had fixed properties amounting to $1,456,623.54, and current assets amounting to $488,[illegible]. There is nothing in the record to show that these values were incorrect. If the claim is true of the representation that the current liabilities of the Orphard Coal Co. amounted to $468,567.31, another representation complained of is that the company owned a mine having a daily output of 1,[illegible] tons, but no proof was made of the reality of this representation. It is also alleged that defendants represented that Orphard Coal Co. controlling the Scranton Coal Mining Co., which had mining concessions with a daily output of [illegible] tons, but plaintiff offered no proof to show that the Orphard Coal Co. did not control the Scranton Company, or that the latter did not have mining properties as plaintiff company represented. With reference to the Lake Export Coal Sales Corporation, it is urged that defendants represented that it had $[illegible] quick assets. Defendants contend that this was a matter of opinion, but regardless of that question no proof was adduced to the contrary. It is also alleged that defendants represented the Lake Export Coal Sales Corporation to have normal earnings of $50,000 to $100,000 per annum, but proof is lacking to show the falsity of that statement. Finally, it is alleged that defendants represented the total earnings of the Orphard Coal Co. for the two fiscal years ending

in March, 1924, as $162,124.94, but no proof was offered to rebut the truth of the statement.

Plaintiff testified that after reading the circular containing the representations complained of, he purchased the bonds, and it is conceded that in October of the same year he exchanged these securities for $1,082 in cash and $20,000 par value of bonds issued by the Standard Coal & Coke Co., which through some process of reorganization had acquired the properties of the Orchard Coal Co. It appears from the evidence that about nine months after plaintiff's purchase a receiver was appointed for the Standard Coal & Coke Co. In the intervening period, plaintiff brought suit on March 26, 1926, against defendants, seeking to set aside his purchase under the Blue Sky Law. His declaration, introduced in evidence, contains no suggestion of the fraudulent representations of which he now complains. An amended declaration was filed in September, 1926, a second amended declaration in July, 1927, and a third amended declaration in January, 1928, all of which appear in the record. None of these pleadings contains any suggestion of the fraudulent representations charged, but are predicated solely upon the provisions of the Blue Sky Law. When the case was called for trial plaintiff asked to withdraw a juror, and thereafter, in April, 1929, more than three years after suit was first instituted, filed a fourth declaration, for the first time alleging fraud. During this long period of time plaintiff filed various other suits, one against Crane, president of the Standard Coal & Coke Co., alleging that the latter was instrumental in causing the Standard Coal & Coke Co. to exchange its bonds for those of the Orchard Coal Co., and that the exchange was in violation of the Blue Sky Law and that plaintiff was damaged to the extent of $20,000. That suit evidently proceeded upon the theory that the Orchard Coal Co. bonds, which are here alleged to be worthless, had a value of $20,000. Another suit, based upon the same theory,

in March, 1924, as [illegible], was no proof [illegible] offered to rebut the truth of the statement.

Plaintiff testified that after receiving the circular containing the representations complained of, he purchased the bonds, and it is conceded that in October of the same year he exchanged these securities for [illegible] in [illegible] and [illegible] shares of stock issued by the Standard Coal & Coke Co., which in such some process of reorganization had acquired the property of the Orchard Coal Co. It appears from the evidence that about nine months after plaintiff's purchase a receiver was appointed for the Standard Coal & Coke Co. In the intervening period, plaintiff brought suit on March 26, 1926, against defendants, seeking to set aside the purchase under the Blue Sky Law. His declaration, introduced in evidence, contains no suggestion of the fraudulent representations of which he now complains. An amended declaration was filed in September, 1926, a second amended declaration in July, 1927, and a third amended declaration in January, 1928, all of which appear in the record. None of these pleadings contains any suggestion of the fraudulent representations charged, but are predicated solely upon the provisions of the Blue Sky Law. When the case was called for trial, plaintiff asked to withdraw a juror, and thereafter, in part, [illegible] more than three years after suit was first instituted, filed a fourth declaration for the first time, alleging fraud. During this long period of time plaintiff filed various other suits, one against a certain president of the Standard Coal & Coke Co., alleging that the latter was instrumental in causing the Standard Coal & Coke Co. to exchange its bonds for those of the Orchard Coal Co., and that the exchange was in violation of the Blue Sky Law and that plaintiff was damaged to the extent of $20,000. That suit evidently proceeded upon the theory that the Orchard Coal Co. bonds, which are here alleged to be worthless, had a value of $20,000. Another suit, based upon the same theory,

was instituted against one Buckman, likewise predicated on violation of the Blue Sky Law. Another proceeding, similar in character, was instituted against Carlton & Koeppe, and still another suit was brought against the defendants in this proceeding, alleging that they had exchanged Standard bonds for his Orchard Coal Co. bonds, in violation of the Blue Sky Law, and that he had been damaged in the sum of $20,000. The declarations in all these cases were verified, and the suits were predicated upon the theory that the Orchard Coal Co. bonds, which are here alleged to have been worthless when purchased in 1925, were worth $20,000 when they were exchanged for Standard bonds, a month later.

There is nothing in the record to indicate that Allen, who is the only one with whom plaintiff dealt prior to the purchase of the bonds, and who is alleged to have made the representations, knew them to be false, and, as heretofore indicated, there is no evidence from which the court could find that the representations were in fact false. Since the action is predicated on fraud, it was incumbent upon plaintiff to prove fraud by clear and convincing evidence (Schiavone v. Ashton, 332 Ill. 484, 498-9), and his failure so to do precludes him from recovery. From all that appears in the record there is nothing to indicate that Allen, who sold plaintiff these bonds, did not honestly believe the representations to be true.

On the question of damages, plaintiff contends that he is entitled to the difference between what the property would have been worth if the representations had been true and what it was in fact worth. Defendants concede this to be the correct measure of damages. Nevertheless plaintiff had the burden under that rule to prove what the bonds were worth when he bought them, and there is no evidence whatever on this point. The argument advanced in plaintiff's brief assumes that because the Standard Coal & Coke Co. went into receivership some nine months after the original transaction was consummated

was instituted against one Dunham, alleged to be a violation of the Blue Sky law. Another proceeding, initiated in Chesterfield was instituted against Carlson & Company, and still another suit was brought against the defendants in this proceeding, claiming that they had exchanged stock and bonds for his Grand Island, in violation of the Blue Sky law, and that he had been damaged in the sum of $20,000. The decisions in all these cases were favorable, and the suits were predicated upon the theory that the Grand Island bonds, which are here alleged to have been worthless when purchased in 1925, were worth $20,000 when they were exchanged for Standard bonds, a month later.

There is nothing in the record to indicate that Blom, who is the only one with whom plaintiff dealt, prior to the purchase of the bonds, and who is alleged to have made the representations, knew them to be false, and, as hereinbefore indicated, there is no evidence from which the court could find that the representations were in fact false. Since the motion is predicated on fraud, it becomes incumbent upon plaintiff to prove fraud by clear and satisfactory evidence. (Schlavone v. Ashton, 325 Ill. 444, 446-7), and this he failed so to do precludes him from recovery. Since the record shows that the record there is nothing to indicate that Blom, the only person with whom plaintiff dealt, did not honestly believe the representations to be true, these bonds, did not knowingly believe the representations to be true.

On the question of damages, it is contended that he is entitled to the difference between what the property would have been worth if the representations had been true and what it was in fact worth. Defendants concede this to be the correct measure of damages. Nevertheless plaintiff has the burden under that rule of proving what the bonds were worth when he bought them, and there is no evidence whatever on this point. The argument advanced in plaintiff's brief assumes that because the Standard Coal Company, and into receivership some nine months after the original transaction, the corporation

that the bonds of the Orchard Coal Co. were worthless when plaintiff bought them. This assumption is hardly consistent with the fact that plaintiff made the exchange of bonds a month after his purchase, and received $1,082 in cash plus the Standard bonds. The Standard Co. receivership had no direct bearing upon the value of the Orchard Coal Co. bonds. The exchange was made by plaintiff voluntarily, and he does not charge any fraud in connection with that transaction. The total mortgage indebtedness of the Orchard Coal Co., according to the circular, was $461,600, whereas that of the Standard Co. was $1,800,000, and it would appear therefore that plaintiff's loss resulted, not from the purchase of the Orchard Coal Co. bonds but from the subsequent exchange for junior bonds of another company which had a much greater indebtedness. In fact, this was the theory underlying the several proceedings filed by plaintiff to set aside the exchange under the Blue Sky Law, and plaintiff took oath that he had been damaged to the extent of $20,000 by the exchange of these securities. The four suits hereinbefore mentioned evidently proceeded upon the assumption that the Orchard bonds were worth what plaintiff paid for them, and it was only after the Blue Sky litigation failed that plaintiff resorted to the charges of fraudulent misrepresentations and alleged that the Orchard bonds, which he theretofore contended were worth $20,000, were actually worthless.

On the question of fraud, plaintiff relies principally upon his conversation with Joseph P. Griffin, one of the defendants, during which Griffin is stated to have said that he knew the Orchard bonds were bad, that the company was no good, and that the bonds should not have been sold. Since the judgment in favor of defendants was entered on a directed verdict, we must assume that Griffin so stated, however improbable it seems that one of the partners of J. S. Bache & Co. should have voluntarily made such a statement. However, in the same conversation Griffin said that he, like plaintiff, had also

that the bonds of the Standard Coal Co. XXXXXX [illegible] plaintiff bought them. This assumption is [illegible] consistent with the fact that plaintiff made on [illegible] of [illegible] his purchase, and received [illegible] in [illegible] bonds. The Standard Co. [illegible] not [illegible] the value of the Orchard Coal Co. bonds. [illegible] by plaintiff voluntarily, and he does not charge [illegible] in connection with that transaction. The total [illegible] according to the circuit [illegible] Co. was $1,800,000, and it would appear therefore that plaintiff's loss resulted, not from the [illegible] but from the subsequent [illegible] which had a much greater [illegible]. In fact, [illegible] the theory underlying the several [illegible] the exchange under the Ohio law, [illegible] had been damaged to the extent of [illegible] of these securities. The four suits [illegible] exceeded upon the assumption that [illegible] plaintiff made for them, and it [illegible] failed that plaintiff [illegible] representations and alleged that [illegible] fore contended were [illegible].

On the question of fraud, plaintiff [illegible] his conversation with Joseph [illegible], on the [illegible] which difficult is [illegible] were bad, that the company was no good, and that [illegible] have been sold. Since the [illegible] on a directed verdict, we must assume [illegible], however impossible it seems that one of [illegible] should have voluntarily made such a statement. However, the same conversation Griffin said that he, like Jaffe, had also

relied on the circular, and it is highly improbable that he could have done so if he had known that the bonds were worthless when plaintiff bought them. In any event, Griffin's statement did not tend to prove the facts which plaintiff was required to prove. Griffin made no representations to induce plaintiff's purchase, and in fact never heard of it until several months thereafter, and plaintiff's testimony as to the conversation had with Griffin could not be taken as an admission of the falsity of the facts contained in the circular, which is the gist of plaintiff's action.

What we have said leads to the conclusion that plaintiff failed to prove that he was induced to purchase these bonds through the fraudulent misrepresentations of defendants, and also to show that he was damaged. The court was therefore justified in directing a verdict in favor of defendants at the close of plaintiff's case. Accordingly, the judgment of the Superior court is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

relied on the circular, and it is highly improbable that he would have done so if he had known that the bonds were worthless when plaintiff bought them. In any event, Griffin's statement did not tend to prove the facts which plaintiff was required to prove. Griffin made no representations to induce plaintiff's purchase, and in fact never heard of it until several months thereafter, and plaintiff's testimony as to the conversation had with Griffin could not be taken as an admission of the falsity of the facts contained in the circular, which is the gist of plaintiff's action.

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AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

897

38830

ISABEL HENEGHAN,
Appellee,

v.

CARSON PIRIE SCOTT & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

235 I.A. 595

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for injuries resulting from a fall on the stairway of defendant's department store. Trial was had before the court without a jury, and at the close of plaintiff's evidence judgment was entered in favor of defendant. Subsequently, on plaintiff's motion, the court granted a new trial. The cause is here for review under an order of this court allowing defendant's petition for leave to appeal.

Plaintiff's statement of claim charged defendant with negligently permitting "the stairs to the basement of said store to be and remain in a dangerous condition, and gave the plaintiff no warning or notice thereof;" that in consequence thereof plaintiff fell down the stairs into the basement below and was severely injured; that she suffered great pain and became obligated for surgeon's charges to the extent of $125 and lost two weeks' earnings at $35 a week.

The only evidence introduced at the trial consisted of plaintiff's testimony and that of Dr. Alger A. Clark, who attended her after the injury. Plaintiff testified that on October 2,1934, at about two o'clock in the afternoon, while shopping in defendant's store she was descending the stairway into the basement when her

38830

ISABEL HAMMONDAM,
Appellee,

v.

CARSON PIRIE SCOTT & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for injuries resulting from a fall on the stairway of defendant's department store. Trial was had before the court without a jury, and at the close of plaintiff's evidence judgment was entered in favor of defendant. Subsequently, on plaintiff's motion, the court granted a new trial. The cause is here for review under an order of this court allowing defendant's petition for leave to appeal.

Plaintiff's statement of claim charges defendant with negligently permitting the stairs in the basement of said store to be and remain in a dangerous condition, and that the plaintiff no warning or notice thereof; that in consequence thereof plaintiff fell down the stairs into the basement below and was severely injured; that she suffered great pain and became obligated for surgeon's charges to the extent of $150 and lost [illegible] weeks' earnings at $35 a week.

The only evidence introduced at the trial on [illegible] plaintiff's testimony and that of Dr. Roger [illegible] Hart her after the injury. Plaintiff testified that on [illegible] at about two o'clock in the afternoon, while shopping [illegible] store she was descending the stairway into the base[illegible] [illegible] October 2, 1932, [illegible] in defendant [illegible] when her

heel caught on the steel plate on the edge of the second step from the top, causing her to trip and fall to the bottom of the stairway, - a distance of about six stairs. She fell forward and was slightly shaken. Her ankle was sprained and her right knee and shin bruised. She was taken in a wheel chair to the infirmary in defendant's store, where she was treated and bandaged. After leaving the infirmary she returned to her place of employment but was unable to resume work and then proceeded to the office of Dr. Clark in the Pittsfield building, who examined her and gave her further treatments. Thereafter she went home in a taxicab.

Dr. Clark, plaintiff's only other witness, testified that he applied dressings and new bandages to plaintiff's shin bone, that she complained of severe backache and pain in the lower part of the abdomen, that he examined her three days later and found a retrodisplacement of the uterus and a tender condition through the pelvic region. No other evidence was offered by plaintiff, and at the close of her case the court found in defendant's favor, with the following comment:

"The Court: It is regretted that the young lady sustained the injury, but the Court has no alternative but to allow the motion."

As ground for reversal of the order granting a new trial, it is urged that plaintiff failed to prove (1) that defendant negligently permitted the stairs of its store to be and remain in a dangerous condition, and (2) that defendant had actual knowledge of any dangerous or defective condition, or that any such condition existed for a sufficient length of time so that defendant in the exercise of ordinary care should have had notice thereof.

The well settled rule of law, which requires one who invites others on his premises to keep the same in a reasonably safe condition, does not make the owner an insurer of the persons thereon. Therefore, in order to permit a recovery in this case it was

heel caught on the [illegible] on the [illegible] on the top, causing her to [illegible] the [illegible] way, - a distance of [illegible] feet. [illegible] slightly absent. [illegible] been one when buried. The [illegible] in [illegible] in front of defendant's store. [illegible] leaving the [illegible] but was unable to [illegible] of Dr. Clark in the Fitzfield building, [illegible] her further treatments. [illegible] in [illegible].

Dr. Clark, plaintiff's only other witness, testified that he applied dressings [illegible] plaintiff's shin bone, that she complained of pain [illegible] in the lower part of the abdomen, that he [illegible] and [illegible] a retroduplacement of [illegible] pelvic region. He [illegible] by [illegible], and at the close of his [illegible] plaintiff's [illegible], with the following [illegible]:

"The Court: [illegible] tained the injury, but [illegible] the motion.

As ground [illegible], it is urged that [illegible] negligently permitted the [illegible] in a dangerous condition, and [illegible] of any dangerous [illegible] existed for a sufficient length of time [illegible] in the exercise of ordinary [illegible].

The well [illegible] others on his premises [illegible] tion, does not make [illegible] Therefore, in ord[illegible]

necessary for plaintiff to allege and prove that the place in question was not in a reasonably safe condition; that if any unsafe condition did exist, it was caused by some negligent act of defendant or had existed for so long a time that defendant, in the exercise of reasonable care, would have known of it in time to have prevented the accident; and that the fall of plaintiff was not proximately caused by any lack of ordinary care on her part.

In Leach v. S. S. Kresge Co., 147 Atl. 759 (R. I.), plaintiff slipped on a stairway and was injured. It appeared from the evidence that her heel came in contact with the brass nosing on one of the stairs and caused a sliver to rip up from the nosing, thereby releasing her heel and permitting her to fall and sustain injuries. The brass nosing when installed on the step was three-eighths of an inch thick. It was plaintiff's contention that defendant negligently permitted the nosing to remain in use until this condition was unsafe and dangerous to persons using the stairs. The only evidence offered to show that the nosing had become worn was that of plaintiff, who testified that after she had fallen she looked and saw a sliver of nosing as wide as her finger and four or five inches in length extending upward and that the edge of the sliver was sharp like a saw. The reviewing court held that the court properly directed a verdict for defendant, and said:

"Assuming that at the time of the accident the nosing in question was in a dangerous condition, there was no evidence either that the defendant knew of the condition or that the dangerous condition had existed for such a length of time that defendant would have known of said condition, if reasonable care had been exercised. * * * Defendant's duty was to use reasonable care, and there was no evidence whatever tending to show that such duty was violated."

In Bohannon v. Leonard, etc. Stores Co., 197 N. C. 755, 150 S. E. 356, defendant had a retail mercantile business on the first floor of a building and in connection with it also had a beauty parlor on the second floor. Across the front of each step on the stairway leading to the beauty parlor was a metal strip, 2 inches

necessary for plaintiff to allege and prove that the place in question was not in a safe condition, i.e., if any unsafe condition did exist, it must be established that either of defendant or had existed for so long a time that defendant, in the exercise of reasonable care, could have learned of it in time to have prevented the accident and that the injury complained of was not proximately caused by any lack of reasonable care on his part.

In Beech v. S. S. Kresge Co., [illegible] Ill. App. 1d. 1, plaintiff slipped on a stairway and was injured. It appeared from the evidence that her heel came in contact with the brass moning on one of the stairs and caused a slipper to trip her from the moning, thereby releasing her heel and precipitating her to fall and sustain injuries. The brass moning when installed on the step was three-eighths of an inch thick. It was defendant's contention that she more negligently permitted the moning to remain in the condition in which it was unsafe and dangerous to persons using the stairs. The only evidence offered to show that the moning had become [illegible] of plaintiff, who testified that after she had fallen she looked and saw a sliver of moning on side of her finger and about five inches in length extending upward and that the edge was very sharp like a saw. The reviewing court held that the [illegible] properly directed a verdict for defendant, and said:

"Assuming that at the time of the accident the moning in question was in a dangerous condition, there was no evidence either that the defendant knew of the condition or that the dangerous condition had existed for such a length of time that defendant would have known of said condition, if reasonable care had been exercised. * * * Defendant's duty was to use reasonable care, and there was no evidence whatever tending to show that such duty was violated."

In Bohannon v. Leonard, etc. Stores Co., 197 N. C. 755, 150 S. E. 356, defendant had a retail [illegible] business on the first floor of a building and in connection with it also had a beauty parlor on the second floor. Across the front of each step on the stairway leading to the beauty parlor was a metal strip, 2 inches

wide. The surface of each of these metal strips as they lay down was one-tenth of an inch higher than the surface of the step. The purpose of the metal strip was to protect the edge of each step from wear. Plaintiff had gone to the beauty parlor and on descending the stairway caught the heel of her left shoe on the metal strip on the edge of the step, and fell. The trial court found in favor of plaintiff. In reversing the judgment the reviewing court said (759):

"The liability of the owner or occupant of a building used as a store for the sale of merchandise to a customer or other invitee for damages resulting from injuries sustained while such customer or other invitee was in the building, and caused by some condition therein, is founded upon the principles on which the law of negligence is predicated. * * * The owner or occupant of the building is not an insurer of the safety of his customer or other invitee, while in the building. * * * He is liable only when the injuries resulting in damages were caused by his failure to exercise reasonable care to provide for the safety of his customers or other invitees. * * * We are of opinion that the evidence offered at the trial * * * fails to show that defendant was negligent in maintaining the stairway * * * The fall was an accident, for which the defendant is not liable."

In both of the foregoing decisions there was some evidence tending to show negligence of the defendant; nevertheless the court in each case held that the evidence submitted, both as to negligence and as to notice, was insufficient to justify a finding in favor of plaintiff. In the instant proceeding there was no evidence that defendant was negligent, and no proof offered that the stairs or metal strip was in a defective or dangerous condition. Neither was it shown that defendant had notice of such condition, if it did exist, or that it had existed for a sufficient length of time so that defendant, in the exercise of ordinary care, should have had knowledge thereof.

Plaintiff's claim is founded solely on the contention that she caught her heel on the steel plate along the edge of the step as she was descending the stairway in defendant's store, and it is argued that a prima facie case of negligence was established by the fact that "defendant maintained, or allowed to remain in a defective

wide. The surface of [illegible] was one-tenth of an inch [illegible] purpose of the [illegible] west. Plaintiff [illegible] stairway on the [illegible] edge of the step, and fell. [illegible] plaintiff. In reversing [illegible] (1952):

"The liability [illegible] as a whole for the [illegible] for damages [illegible] other invites [illegible] therein, is [illegible] gence is practiced. [illegible] not an insurer [illegible] in the building [illegible] in damages [illegible] provide for [illegible] to show that [illegible] The fall was an accident, [illegible]

In both of the [illegible] tending to show [illegible] in each case held [illegible] and as to notice, [illegible] plaintiff. In the instant [illegible] defendant was negligent, [illegible] metal strip was in [illegible] was it shown that [illegible] exist, or that it [illegible] that defendant, in [illegible] knowledge thereof.

Plaintiff [illegible] she caught her heel [illegible] as she was descending [illegible] argued that a prima facie [illegible] fact that "taking a metal [illegible]

condition, a stairway with a metal strip covering the edge of each tread." In all the cases cited by plaintiff there was evidence of negligence in the maintenance of the premises. In the instant case we are unable to find any evidence in the record supporting the charge and the argument that the stairway was "quite obviously in a defective and dangerous condition." Without such proof plaintiff has failed to make a case, and we think the court properly made a finding and entered judgment in defendant's favor at the close of plaintiff's case. Since the court found defendant not guilty and entered final judgment on the finding it will be unnecessary to remand the case. The order granting a new trial is therefore reversed.

REVERSED.

Scanlan and Sullivan, JJ., concur.

condition, [illegible]
such breed." [illegible]
evidence [illegible]
the instant [illegible]
supporting the [illegible]
quite obviously [illegible]
our such proof [illegible]
the court properly [illegible]
auth's favor [illegible]
found defendant was guilty [illegible]
ing it will be unnecessary [illegible] a new trial is unnecessary.

[illegible]

Jackson and Sullivan, JJ., concur.

38387

PEOPLE OF STATE OF ILLINOIS
ex rel. JOHN S. RUSCH,
Defendant in Error,

vs.

HENRY LYNCH, LOUIS E. CARBONE
and JOHN LIDRA,
Plaintiffs in Error.

ERROR TO COUNTY COURT
OF COOK COUNTY.

285 I.A. 595

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error issued out of this court July 2, 1935, is prosecuted to reverse a judgment of the County court of Cook county entered by Judge Charles T. Allen on August 17, 1934, sentencing Henry Lynch and Louis E. Carbone, judges of election, and John Lidra, clerk of election, in the 9th precinct of the 27th ward in the City of Chicago, to the Cook County jail for ninety days each for contempt of court committed as such judges and clerk, respectively, in their canvass and return of the votes cast in said precinct at the General Election held November 4, 1930. In case No. 37796 a writ of error was sued out of this court involving the identical parties and subject matter. In that proceeding the contemnors' bill of exceptions was stricken from the record March 5, 1935, and thereafter on May 24, 1935, this court rendered its opinion affirming the judgment of the County court.

October 8, 1935, the following motion, which was reserved to hearing, was presented in behalf of the defendant in error:

"Now comes THOMAS J. COURTNEY, States Attorney of Cook County, attorney for Defendant in Error, and moves the court to dismiss the Writ of Error in the above entitled cause for the following reasons:

1. That the same parties, Plaintiff in Error and Defendant in Error, the same subject matter, have been adjudicated by this Honorable Court in court number 37796.

2. That the errors assigned by Plaintiffs in Error in the above entitled cause are included in the assignment of errors filed by Plaintiffs in Error in cause number 37796, and all of the issues

PEOPLE OF [illegible] OF ILLINOIS
ex rel. JOHN C. [illegible],
Defendant in Error,

vs.

HENRY LYMON, LOUIS [illegible]
and JOHN LIDDA,
Plaintiffs in Error.

MR. JUSTICE [illegible] DELIVERED [illegible]

This writ of error [illegible]
is prosecuted to reverse a judgment [illegible]
county entered by Judge [illegible]
sentencing Henry Lymon [illegible]
and John Lidda, clerk of [illegible]
27th ward in the city of Chicago, [illegible]
ninety days each for [illegible]
and clerk, respectively, in [illegible]
cast in said precinct at the [illegible]
1930. In case No. 27[illegible] [illegible]
court involving the identical [illegible]
that proceeding the contestee [illegible]
from the record herein, [illegible]
this court rendered its [illegible]
County court.

October 3, 1[illegible], the [illegible]
to hearing, was presented in [illegible]

"Now comes John C. [illegible]
County, attorney for the [illegible]
dismiss the Writ of Error in [illegible]
following reason to:

1. That the same [illegible]
in Error, the same [illegible]
Honorable Court in court number [illegible].

2. That the [illegible]
above entitled cause are included in [illegible]
by Plaintiffs in Error in cause number [illegible]

involved in cause number 37796 cover the issues raised in the above entitled cause and said issues have been decided adversely to the Plaintiffs in Error by the judgment of the Appellate Court of Illinois, First District, Second Division, in cause number 37796."

The contemnors contend that they were found guilty of direct contempt as officers of the County court, that it was necessary for the county judge to have stated in the judgment order facts as to their conduct constituting the contempt with sufficient particularity and certainty to show that the court was authorized to enter the order and that the conclusion of law contained in the order that they did "knowingly, fraudulently and unlawfully make false return and canvass of votes cast" is not a sufficient statement upon which to predicate the judgment.

Whether or not this contention is meritorious we need not decide, as the contemnors cannot be heard to urge it here. As heretofore stated, the identical judgment order contained in the record now presented was before us in our review of this cause under the previous writ of error and it is inconsequential whether the particular errors assigned now were relied upon in the former proceeding. Suffice it to say that they could have been.

In Harding Co. v. Harding, 352 Ill. 417, in passing upon the question raised by the motion to dismiss this writ of error, the court said at page 426:

"The doctrine of res judicata is, that a causeof action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal, except as the judgment or decree may be brought before a court of appellate jurisdiction for review in the manner provided by law. A judgment or decree so rendered is a complete bar to any subsequent action on the same claim or cause of action, between the same parties or those in privity with them. The doctrine extends not only to the questions actually decided but to all grounds of recovery or defense which might have been presented. (Wright v. Griffey, 147 Ill. 496; Markley v. People, 171 id. 26; Terre Haute and Indianapolis Railroad Co. v. Peoria and Pekin Union Railway Co., 182 id. 501; Harvey v. Aurora and Geneva Railway Co., 186 id. 283; Godschalck v. Weber, 247 id. 269; People v. Harrison, 253 id. 625.)"

involved in some manner [illegible]
above entitled cause [illegible]
to the Plaintiffs [illegible]
of Illinois, which [illegible]
3726."

The contention [illegible]

direct contempt as [illegible]
sary for the court [illegible]
as to their conduct [illegible]
ticularly are certain [illegible]
enter the order [illegible]
order that they [illegible]
false return and [illegible]
ment upon which [illegible]

Whether or not [illegible]
decree, as the [illegible]
before stated, the [illegible]
now presented [illegible]
previous writ of error [illegible]
ticular errors and [illegible]
ing. Suffice it [illegible]

In Harding [illegible]
question raised by the [illegible]
court said at page 186:

"The doctrine of res [illegible]
determined between the parties [illegible]
tent jurisdiction, [illegible]
before the same or any other [illegible]
decree may be [illegible]
review in the manner [illegible]
rendered in a [illegible]
claim or cause of [illegible]
privity with [illegible]
actually decided but [illegible]
might have been [illegible]
Markley v. People, 171 Ill. [illegible]
Co. v. People and [illegible]
Aurora and Geneva Railway Co., [illegible]
id. 290; People v. Harrison, [illegible]

The cause of action, the subject matter and the parties being identical, the judgment of this court in case No. 37796, affirming the judgment of the County court, is an absolute bar to the prosecution of this writ of error and the motion to dismiss same is, therefore, allowed.

In any event our Supreme court in an opinion filed at its April, 1936, term, in The People ex rel. John S. Rusch v. Frank Kotwas et al., docket No. 22645 (not yet published), in holding that a contempt case similar to this is not a criminal proceeding and cannot be reviewed by writ of error, said:

"Plaintiffs in error, who were judges and clerks of an election held in Chicago, November 8, 1932, were found guilty of contempt of court by the county court of Cook county, which imposed various sentences on the different parties. The citation was issued and the proceedings had pursuant to the statute (Smith's Stat. 1933, chap. 46, art. 2, sec. 13,) which provides for the summary punishment of misbehavior by judges or clerks of election. The judgments against the plaintiffs in error have been affirmed by the Appellate Court for the First District and a further review is sought by this writ of error.

"The statute under which the plaintiffs in error were punished provides, in substance, that judges and clerks of election, appointed as therein provided, shall be commissioned by and become officers of the county court, 'and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral testimony in a summary way, without formal pleadings, but such trial or punishment for contempt of court shall not be any bar to any proceedings against such officers, criminally, for any violation of this act.' * * *

"In People v. Jilovsky, 334 Ill. 536, we held that a proceeding pursuant to a citation under the foregoing section of the City Election act, was not such a criminal prosecution as was contemplated by section 33 of article 6 of the constitution, requiring that criminal prosecutions be carried on in the name and by the authority of the People of the State of Illinois. In the same case we reaffirmed our holding that contempts are not crimes, within the meaning of the statute defining misdemeanors, (citing People v. Panchire, supra (311 Ill. 622)) and in People v. White, 334 Ill. 465, we held that a contempt under this act could not be said to be a criminal contempt, as that term was understood at the common law.

"It is further to be noted that the act expressly provides that no punishment administered pursuant to its terms shall be a bar to any criminal prosecution where the same facts constitute a crime. Furthermore, the provision permits punishment for 'any misbehavior in their office.' This could include many things not criminal in their nature, such as boorish incivility to voters and many other acts readily conceivable which would not amount to any form of crime. Upon reason, as well as authority, we are of the opinion that this is not a criminal case within the meaning of section 11 of article 6 of the constitution, and that we have no jurisdiction to review the judgment of the Appellate Court by writ of error."

The cause of action, [illegible] are being identical, [illegible] affirming the judgment [illegible] the procedure [illegible] same is, therefore, [illegible].

In any event our [illegible] April, 1936, [illegible] Rolves et al., [illegible] that a contempt case [illegible] and cannot be reviewed [illegible]:

"Plaintiffs in error, [illegible] election held in Chicago, November [illegible] contempt of court by the county [illegible] posed various sentences on the [illegible] issued and the proceedings [illegible] Stat. 1933, chap. 42, par. [illegible] many counts [illegible] judgments against the plaintiffs [illegible] Appellate Court for the first [illegible] sought by this writ of error.

"The statute [illegible] issued provides, in substance, that [illegible] appointed as [illegible] officers of the county [illegible] for contempt for any [illegible] open court or oral testimony [illegible] pleadings, but not [illegible] not be any bar to any prosecution [illegible] for any violation of [illegible]

"In People v. Gilmore, [illegible] ing pursuant [illegible] Election act, was not such a criminal [illegible] by section 34 of [illegible] criminal prosecution [illegible] of the People of the [illegible] affirmed our holding [illegible] ing of the act [illegible] supra (311 Ill. 629) and [illegible] that a contempt [illegible] contempt, as that term was [illegible]

"It is [illegible] that no punishment authorized [illegible] bar to any criminal prosecution [illegible] crime. But errors, the [illegible] behavior in their [illegible] criminal in their nature, [illegible] many other acts [illegible] form of crime. Upon error, [illegible] opinion that this is not [illegible] section 11 of article [illegible] jurisdiction to review [illegible] writ of error."

October 14, 1935, a motion, which was also reserved to hearing, was filed in behalf of the contemnors by their counsel to strike defendant in error's motion to dismiss this writ of error because of the irregularity and insufficiency of the service on their counsel of the notice of such motion. It is sufficient to state that, although service of the notice of the motion was irregular and did not comply with the rules of this court, counsel for plaintiffs in error waived such irregularity by responding to the notice in apt time with counter suggestions and with the instant motion to strike defendant in error's motion to dismiss the writ of error. The motion to strike is therefore denied.

WRIT OF ERROR DISMISSED.

Scanlan, P. J., and Friend, J., concur.

October 14, 1958, a motion, [illegible] to transfer to hearing, was filed in behalf of the defendants by their counsel to strike defendant [illegible] error's [illegible] it or error because of the irregularity [illegible] of the [illegible] on their counsel of the notice of such [illegible]. It is sufficient to state that, although service of [illegible] e on [illegible] with a [illegible] irregular and did not comply with [illegible] court, counsel for plaintiffs in error waived such irregularity by responding to the notice in apt time with a motion [illegible] and with the instant motion to strike defendant in error's motion [illegible] the writ of error. The motion to [illegible] is denied.

[illegible] ORDERED.

Beaulan, P. J., and Friess, J., concur.

38409

THE NATIONAL BANK OF THE REPUBLIC, etc.,
Complainant,

v.

JAMES K. SWENEY et al.,
Defendants below.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

CHARLES E. BARTLEY,
Defendant and Appellant,

v.

PAUL CORKELL, as receiver,
Appellee.

285 I.A. 595

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by Charles E. Bartley seeks to reverse an order of the Superior court of March 1, 1935, allowing certain fees to Paul Corkell, receiver, and his solicitor on the ground that such fees are grossly excessive.

Proceedings were brought to foreclose a first mortgage on the premises known as 5000-5006 Drexel Boulevard, Chicago. Prior to the entry of the order from which this appeal is taken the period of redemption following the sale had expired. Bartley, a defendant in this cause, owned approximately 85% of the bonds upon which the foreclosure was predicated and owns approximately 85% of the deficiency under the decree entered pursuant to the sale.

One Murty M. Fahey, who had on November 28, 1928, been appointed receiver of the property involved, filed his first current report November 17, 1930, showing that such property

38409

THE NATIONAL BANK OF THE REPUBLIC, etc., Complainant,	
v.	
JAMES K. SWENEY et al., Defendants below,	AT LAW.
	TUE TERM COURT,
	COOK COUNTY.
CHARLES E. BARTLEY, Defendant and Appellant,	
v.	
PAUL CONKELL, as receiver, Appellee.	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by Charles E. Bartley seeks to reverse an order of the Superior court of March 1, 1933, fixing a certain fees to Paul Conkell, receiver, and his solicitor on the ground that such fees are grossly excessive.

Proceedings were brought to foreclose a first mortgage on the premises known as 3600-3606 Drexel Boulevard, Chicago. Prior to the entry of the order from which this appeal is taken the period of redemption following the sale had expired. Bartley, a defendant in this cause, owned approximately 85% of the bonds upon which the foreclosure was predicated and owns approximately 85% of the deficiency under the decree entered pursuant to the sale.

One Marty M. Roney, who had on November 28, 1930, been appointed receiver of the property involved, filed his first current report November 17, 1930, showing that such property

was improved with a three-story brick building containing twelve large apartments remodeled into sleeping and light housekeeping rooms and that he had on hand as receiver a balance of $4,120.78.

March 28, 1931, an order was entered appointing Paul Corkell successor receiver.

May 15, 1931, an order was entered directing Fahey, as receiver, to turn over to Corkell, his successor, $5,636.78, and further directing Fahey's discharge as receiver upon such payment. Fahey was found to be short in his accounts to this extent and his surety thereafter paid Corkell $4,934.49 on account of this shortage.

Approximately $9,000 collected during his incumbency by Fahey was turned over by him or for his account to Corkell. The following summary of the six current reports made by Corkell shows the periods covered by same as well as the rents collected by him and the amounts allowed and paid as fees, respectively, to him and his solicitor:

	"Rents Collected	Receiver's fees	Attorney's fees
1st report Jan. 26, to June 5, 1931	$ 8,013.76	- - -	- - -
2nd report June 6, 1931, to January, 1932	8,507.70	$2,000.00	$2,000.00
3rd report Feb. 1st to July 31,1932	2,400.00	125.00	125.00
4th report Aug. 1, 1932 to May 24, 1933	2,000.00	50.00	100.00
5th report May 25, 1933 to January 8, 1934	1,683.40	100.00	100.00
6th report January 9, 1934 to June 18, 1934	1,819.50	- - -	- - -
	$24,424.36	$2,275.00	$2,325.00"

The first five current reports of receiver Corkell were approved by the chancellor and the allowances for fees as above indicated ordered without objection.

When his sixth current report was filed June 22, 1934, for

was im[illegible] large a[illegible] room [illegible] that he [illegible]

across [illegible]

Corkell succeeded [illegible]

May 14, 1923, [illegible] receiver, to turn over [illegible] further directing [illegible] Tahey was found to be [illegible] his surety [illegible] shortage.

Practically [illegible] Tahey was turned over [illegible] following [illegible] the periods covered [illegible] and the [illegible] and his solicitor:

	Amount	Attorney's fees
1st report		
Jan. 26, to June 5, 1923	[illegible]	- - -
2nd report		
June 6, 1923, to January, 1925	[illegible]	[illegible]
3rd report		
Feb. 1st to July, [illegible]	[illegible]	125.00
4th report		
Aug. 1, 1925, to May 6, 1933	[illegible]	[illegible]
5th report		
May 25, 1933 to January 6, 1934	[illegible]	[illegible]
6th report		
January 5, 1934 to Jan. 18, 1934	[illegible]	[illegible]

The [illegible] approved by [illegible] indicated orders [illegible]

When his return [illegible] for

the period above shown; it recited generally services rendered by the receiver and his solicitor and prayed for the allowance of fees. Objections were filed to this report by Bartley which recited "that the receiver, since the date of his appointment, has collected as rentals the gross sum of not in excess of $23,000, exclusive of the amount reported in the sixth account, and has been allowed, together with his solicitor, fees amounting to $4,600 or an amount equal to 20% of the gross collections, and is, therefore, not entitled to any further compensation."

The receiver's seventh and final account and report was filed December 7, 1934, showing gross rental collections of $1,497.37 for the period from June 19, 1934, to the date of the report and praying for the allowance of additional fees in the amount of $250 each to the receiver and his solicitor. Supplemental objections filed by Bartley to Corkell's seventh and final report and to his discharge as receiver also renewed his objections filed to the sixth report, and averred that the fees theretofore allowed the receiver and his solicitor under the second, third, fourth and fifth current reports were excessive in that they exceeded 20% of the gross rentals collected.

It will be noted that the gross rentals actually collected by Corkell, as shown by his seven reports, amounted to $25,921.73, and that exclusive of the $250 each allowed the receiver and his attorney as fees by the order approving the seventh and final report, they had theretofore been allowed fees aggregating $4,600 under the second, third, fourth and fifth current reports. While it is true that Corkell accounted for almost $35,000 of rent collections, about $9,000 of that amount represented rents collected by Fahey, which was turned over to Corkell as his successor. The record also discloses that commencing with November, 1931, the property was operated on a net lease, which necessarily rendered the receiver's duties

the period above shown is treated [illegible] material [illegible] entered by the receiver and his clerks [illegible] fees. Objections were filed to the [illegible] report by [illegible] treated "that the receiver, [illegible] has collected as rents [illegible] excluding of the amount reported [illegible] allowed, together [illegible] or an amount equal to the [illegible] not entitled to any [illegible]

The receiver's [illegible] filed October 7, 1924, showing [illegible] of $1,497.37 for the period from [illegible] report and praying for the allowance [illegible] amount of $250 [illegible] objections filed by [illegible] and to his discharge [illegible] to the sixth report, and [illegible] the receiver and his [illegible] and fifth current reports were [illegible] of the gross rentals collected.

It will be noted that the [illegible] by Corkell, as shown by his [illegible] and that evaluation of [illegible] attorney as fees by the [illegible] they had therefore been allowed [illegible] second, third, fourth [illegible] report. It is true that Corkell accounted for almost [illegible] $19,000 of that amount represented rents collected by Kahy, which was turned over to Corkell as his successor. The record also discloses that commencing with November, 1921, the property was rented on a net lease, which necessarily rendered the receiver's duties

less arduous. It is suggested that Corkell's solicitor also acted for Fahey, in which capacity he was allowed no compensation. That fact should and can have no bearing on the fees allowed him as Corkell's solicitor.

When Bartley's objections to all the receiver's current reports, as well as to his final report, were called for hearing, the following occurred:

"Mr. Smith: May it please the Court, I represent Charles E. Bartley, whom your Honor will recall is the owner of more than 80% of the deficiency decree heretofore entered in this cause; various objections were raised and filed by my client from time to time to the Accounts rendered by the Receiver, particularly to the fees charged and allowed. We are here this morning to state that all objections have been disposed of without requiring the time of this Court with the exception of the objections raised to the fees allowed to Paul Corkell, as Receiver, and to Joseph H. Nicolai, as solicitor for the Receiver. We would like briefly to be heard by your honor on these objections.

"Mr. Nicolai: Your Honor, this is the case in which we have all spent so much time. We believe that the fees allowed are reasonable and that the final account should be approved and the Receiver discharged without further delay.

"The Court: As you know, this case has already required a great deal of my time. Mr. Smith, you have not been in this case from the beginning and you may not be informed asto the amount of my time and of the Receiver's time and of the Receiver's solicitor's time which has been required. This Court took notice of the fact that the first Receiver appointed in this case, Mr. Fahy, failed to perform his duties; that thereupon and upon the objections of Mr. Bartley, a great deal of time was consumed in straightening out this Receiver's accounts; that Mr. Nicolai, Mr. Corkell, Mr. Bartley and his attorney have had very frequent and extensive hearings before me in this regard; that subsequently, as a result of these hearings, approximately $5,000 was recovered back from the Bonding Company covering the first Receiver and Mr. Corkell was appointed in his stead; that Mr. Bartley was allowed some $2,000 at that time for his attorney's fees covering services rendered by his attorneys during these proceedings; that since his appointment as Receiver, Mr. Corkell has, with the greatest diligence, sought to collect the maximum income from this property and dealt with a difficult tenant with respect to whom he had a number of hearings; that he has served as receiver over a period of four years, and that during that time he was [has] presented seven detailed accounts, which in themselves, required considerable time to prepare; that objections were raised to many of these accounts and that there were many continuances and hearings upon the same; that Mr. Corkell and his attorney, Mr. Nicolai, have spent considerable time with you in considering Mr. Bartley's objections to these accounts. Countless hours of time were consumed in court alone upon these various hearings by Mr. Corkell, Mr. Nicolai and Mr. Bartley in my presence, and that in addition time much greater than that has been spent out of the presence of the court, not only in managing the property and dealing with a difficult tenant, but

less arduous. [illegible] also
acted for "Ashby", in which capacity he was allowed to [illegible]
That fact should not have [illegible] in
as Corkell's solicitor.

"Upon Bartley's objections to all [illegible] accounts
reports, as well as to his final report, [illegible] or [illegible] think,
the following occurred:

"Mr. Smith: May it please the court, [illegible] Bartley, when your Honor will recall in [illegible] of not [illegible] 80% of the deficiency decree heretofore entered in this cause, various objections were raised and filed by my client from time to time to the accounts rendered by the [illegible], particularly to the fees charged and allowed. [illegible] to state that all objections have been disposed of without requiring the time of this Court with the exception of the objections relative to the fees allowed to Hugh Corkell, [illegible] to Hugh H. Nicolai, as solicitor for the receiver. [illegible] to be heard by your Honor on these objections.

"Mr. Nicolai: Your Honor, [illegible] have all spent so much time. [illegible] are reasonable and that the [illegible] the Receiver disapproved without further delay.

"The Court: [illegible] a great deal of my time. [illegible] case from the beginning [illegible] amount of my time and [illegible] solicitor's time which has been reasonable. [illegible] of the fact that the first Receiver [illegible] Tony, failed to perform his duties; that [illegible] objections of Mr. Bartley, [illegible] straightening out this Receiver's account; [illegible] Mr. Corkell, Mr. Bartley and his [illegible] and extensive hearings before me in this [illegible] as a result of these hearings, [illegible] back from the Loan and Company covering the first Receiver [illegible] Corkell was appointed in his stead; [illegible] some $2,000 at that time for his services, [illegible] rendered by his attorneys in these proceedings [illegible] appointment as Receiver, Mr. Corkell has, with the greatest diligence, sought to collect the money from [illegible] and dealt with a difficult tenant [illegible] number of hearings; that he has served [illegible] of four years, and that during that time he has [illegible] seven detailed accounts, which in themselves, [illegible] to prepare; that objections were raised to many of these accounts and that there were many conferences [illegible] that Mr. Corkell and his attorney, Mr. Nicolai, have spent considerable time with you in [illegible] objections to these accounts. Countless hours of time have [illegible] in court alone upon these various [illegible] Mr. Nicolai and Mr. Bartley in my presence, and that in addition time much greater than that has been spent out of the presence of the court, not only in managing the property and [illegible] with a difficult tenant, but

in the preparation of the accounts and consideration of the objections. The Court has taken notice of the amount of time and labor consumed herein, much of which took place in the actual presence of the court.

"It is the opinion of the court that the fees allowed to this date are reasonable and are earned fees, commensurate with the amount of time and labor consumed. Since the Court has personal knowledge of the extent of these services, there can be no justification for any further hearing upon this question of fees, and if that is the only objection now pending, it is my duty to approve the final account as rendered, together with all past fees allowed.

"Mr. Smith: I realize that I recently entered this case, having been substituted for former counsel within the last six months. Nevertheless, if the court please, I ask that these fees be reduced because they are in a proportion of approximately 20% of the rentals collected. There is no written testimony in the record to support the fees allowed, and my position is that a receiver, as an officer of the court, stands in a position of service and cannot necessarily be remunerated in proportion to the amount of work he has performed. In short, the income of the property ought to form a limitation as to the amount of these fees.

"The Court. I agree with you that the income of the property is an element to be considered in fixing fees. However, it is my holding that the court has discretion in the amount of fees to be allowed and that all of the elements of income, time and labor must be considered together. In view of my personal knowledge of the latter, as I have reviewed it, I consider the fees reasonable and that no further hearing could be justified. If you will prepare an order, I will enter it, approving the final account as rendered without taking testimony and discharging the receiver."

Thereupon the chancellor entered the order appealed from, of which the following portions are pertinent:

"It further appearing unto the Court that no proofs have been taken with respect to the services performed by said Receiver and his counsel as basis for the fees allowed to date; that no hearing has been had before Master in Chancery Sidney S. Pollack, to whom said cause was referred on the 7th day of December, A. D. 1934; that said parties desire that that portion of the order entered December 7, 1934, referring said cause to Master in Chancery Sidney S. Pollack be vacated and that the question remaining with respect to said fees shall be submitted in open court, * * * and the court having examined the various accounts heretofore filed by the said Receiver and the various orders allowing fees from time to time in connection therewith and the Court having examined the objections made thereto and after having heard the testimony of all parties and being fully advised in the premises,

"The Court Further Orders that the objections of the said Charles E. Bartley filed June 29, 1934, and March 1, 1935, be and the same are overruled; that the Sixth Report and the Seventh and Final Report as filed by the said Paul Corkell, as Receiver herein, be and the same are hereby approved.

"The Court Further Finds that the fees heretofore and herein allowed to Paul Corkell, Receiver, and his solicitor, are reasonable

in the [illegible] of the [illegible]
jections. The Court has [illegible]
labor consumed herein, much of [illegible]
presence of the court.

"It is the opinion of the [illegible]
this date are [illegible] and are [illegible]
the amount of time and [illegible]
knowledge of the [illegible]
ondition for any further hearing upon [illegible]
that is the only [illegible] it is my [illegible]
the final account [illegible]

"Mr. Smith: I realize that [illegible]
having been [illegible]
months. Nevertheless, in the [illegible]
be reduced because they [illegible]
of the rental collected. There is no [illegible]
record to suppo[illegible]
receiver, as an citizen of the [illegible]
vice and cannot [illegible]
amount of work he has performed. [illegible]
property owned to form a [illegible]

"The Court: I agree with you [illegible]
is an element to be considered [illegible]
holding that the [illegible]
allowed and that all of the elements [illegible]
be considered together. [illegible]
letter, as I have notified [illegible]
that [illegible]
an order, I will enter it, approving the final account [illegible]
without making [illegible]

Thereupon the [illegible]

of which the following [illegible]

"It further [illegible] been taken with respect to the [illegible] by said receiver and his counsel [illegible] hearing has been [illegible] to which said counsel [illegible] 1954; that said [illegible] entered December 7, 1954, [illegible] Sidney S. Pollock be [illegible] respect to said fees [illegible] court having examined the various [illegible] said receiver and the various [illegible] in connection therewith and [illegible] made thereto and [illegible] being fully advised in the premises,

"The Court further [illegible] Charles R. Bentley filed [illegible] the same are overruled; that the [illegible] Final Report as filed by [illegible] be and the same are hereby approved.

"The Court further finds that the fees herein [illegible] allowed to Paul [illegible] and his [illegible]

and the Court allows further and additional fees to the said Paul Corkell, as Receiver, in the amount of Two Hundred Fifty Dollars ($250.00) and further and additional fees to Joseph H. Nicolai, as his solicitor, in the amount of Two Hundred Fifty Dollars ($250.00).

"It is Further Ordered that the said Paul Corkell be and he is hereby discharged from further duties as such Receiver."

Defendant Bartley contends that the aggregate amount of fees allowed to the receiver and his attorney is excessive and disproportionate to the gross rent collections; that a receiver is an officer of the court and a public servant and that the compensation allowed to him and to his attorney, as well as to other public servants, cannot be fixed upon the sole basis of the nature and extent of the services rendered so as to appropriate an unduly large portion of the fund which it should be the aim of the receiver to conserve; that since the extent and nature of the services of the receiver and his attorney entered into the compensation allowed, he should have been compelled to offer proof of such services upon Bartley's objections, the personal knowledge of the court, together with the reports of the receiver, furnishing an insufficient basis for the allowance of fees aggregating 20% of the gross rent collections.

The receiver's theory is that the court had personal knowledge that the services were extensive and diligently performed and that the chancellor's action in fixing the amount of the fees approved did not constitute an abuse of discretion.

The chancellor had full power and authority, when the final report of the receiver was filed, to investigate and determine the correctness of all his accounts, including the allowance and disbursement of fees, notwithstanding previous approval of reports and accounts for parts of the period of the receiver's administration. (Standish v. Musgrove, 223 Ill. 500; Steele v. Ruprecht, 147 Ill. App. 646.)

Bartley was denied a hearing on his objections to the fees

and the Court [illegible]
Paul Corkill, [illegible] in the [illegible]
Holmes ([illegible]) and [illegible]
M. Mitchell, on his [illegible] in [illegible]
Collins ([illegible]).

"It is [illegible]
and he is hereby [illegible]

Defendant [illegible]
fees allowed to the [illegible]
disproportionate [illegible]
is an officer of the court [illegible]
ation allowed to the [illegible]
servants, cannot be fixed upon [illegible]
tent of the [illegible]
portion of the time which it should be [illegible]
that since the [illegible]
his attorney [illegible]
been compelled to [illegible]
jections, the personal [illegible]
ports of the receiver, [illegible]
ance of fees as [illegible]

The receiver's [illegible]
that the services [illegible]
chancellor's action in [illegible]
constitute an abuse of discretion.

The chancellor [illegible]
report of the receiver [illegible]
correctness of all his accounts, [illegible]
bursement of fees, [illegible]
accounts for [illegible]
(Stanulis v. [illegible]
App. 646.)

Bartley [illegible]

allowed the receiver and his attorney, and such fees were approved solely on the chancellor's personal recollection and knowledge of the services rendered and his consideration of the receiver's reports. It is true that the receiver's several reports included statements of his receipts and disbursements and a general statement of services rendered by him and his attorney was made in the reports wherein an allowance of fees was prayed, but the record does not disclose any itemization of the time devoted to the receivership or the character of work performed by either the receiver or his attorney.

We have carefully examined all the cases cited and many others, and while the rule is established in this state that an allowance of fees to a receiver and his attorney, based wholly or in part on the personal knowledge of the chancellor, will not be disturbed unless it is unreasonable and excessive or exhibits a manifest abuse of discretion by the trial court, the rule is also firmly established that a party in interest, who interposes timely objections to the allowance of fees alleged to be grossly excessive, is entitled to a hearing on same. Such a hearing was denied in this case.

But, regardless of all other issues, Bartley insists that the paramount question presented for our determination is, Did the trial court abuse its discretion under all the circumstances of this case when it allowed the receiver and his attorney fees aggregating 20% of the gross rents collected by the receiver?

That the question of fees in this case was decided by the chancellor solely upon his own personal recollection and knowledge, that defendant Bartley was denied a hearing on his timely objections to fees theretofore allowed and additional fees prayed for, and that the receiver did not and was not compelled to submit proof as to the extent and nature of the services performed by him and his solicitor

allowed the receiver and his attorney, [illegible] such fees, [illegible] solely on the chancellor's personal [illegible] of the services rendered and his conclusion [illegible] receiver's report. It is true that the receiver's [illegible] statements of his [illegible] ment of services rendered by him and his [illegible] reports wherein an allowance of fees was [illegible], but the record does not disclose any itemization of [illegible] given to the reasonableness or the character of work performed by either the receiver or his attorney.

We have carefully examined the [illegible] and many others, and while the rule is established in [illegible] allowance of fees to a receiver and his [illegible], [illegible] or in part on the personal [illegible] of the chancellor, [illegible] be disturbed unless it is [illegible] a manifest abuse of discretion [illegible] also firmly established that [illegible] timely objections to the [illegible] excessive, it should be [illegible] denied in this case.

But, regardless of [illegible] the personal [illegible] trial court [illegible] this case [illegible] aggregating [illegible]

That the question [illegible] chancellor solely upon his [illegible] that defendant Hartley [illegible] to fees theretofore allowed [illegible] the receiver did not [illegible] extent and nature of the [illegible] by him and his solicitor

are all circumstances which, considered with the disproportionateness of the amount of fees allowed to the gross income from the property, are indicative of an abuse of discretion by the trial court.

While no means are afforded this court for an intelligent and equitable determination of the compensation that should be allowed the receiver and his solicitor, inasmuch as there is nothing in the record to show either the character of the work performed or the time devoted to it, it does seem to us that the allowance of fees of 20% of the gross rents collected is excessive.

The interests of all concerned, in our opinion, will be best served by a full and fair hearing in the trial court, where the receiver should be required to furnish proof of the extent and nature of the services rendered by him and his solicitor, the chancellor then to order just and reasonable compensation after due consideration of all proper elements, including the amount of the gross rent collections by the receiver.

For the reasons indicated the order of the Superior court of March 1, 1935, is reversed and the cause remanded with directions to grant a hearing on defendant Bartley's objections to allowances of fees made under the several reports of the receiver, Corkell, and for such other proceedings as are not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

are all circumstances which, considered with the disproportionateness of the amount of loss allowed to the gross income from the property, are indicative of an abuse of discretion by the trial court.

While no means are afforded the court for an intelligent and equitable determination of the compensation that should be allowed the receiver and his solicitor, inasmuch as there is nothing in the record to show either the character of the work performed or the time devoted to it, it does seem to us that the allowance of fees of 50% of the gross rents collected is excessive.

The interests of all concerned, in our judgment, will be best served by a full and fair hearing in the trial court, where the receiver should be required to furnish proof of the exact and nature of the services rendered by him and his solicitor, the chancellor then to order just and reasonable compensation after due consideration of all proper elements, including the amount of the gross rent collections by the receiver.

For the reasons indicated the order of the chancery court of March 1, 1935, is reversed and the cause remanded with directions to grant a hearing on determining a fairly reasonable allowances of fees made under the several reports of the receiver, Cornell, and for such other proceedings as are not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Gresham, P. J., and Friend, J., concur.

285 Ill. App (abst.)

92 4

38474

IN THE MATTER OF THE ESTATE OF
MELBERT W. LORCH.

STATE MUTUAL LIFE ASSURANCE
COMPANY, a corporation,
Appellant,

v.

HARRY S. LORCH,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

285 I.A. 595[4]

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal respondent, State Mutual Life Assurance Company of Worcester, Massachusetts, seeks to reverse the judgment of the circuit court entered after a trial de novo without a jury, affirming an order appealed from the probate court which granted letters of administration to Harry S. Lorch, petitioner, upon the presumed death of his brother Melbert W. Lorch.

The petition of Harry S. Lorch, filed in the probate court January 9, 1934, under secs. 20 and 20A of the Administration of Estates act (Cahill's 1933 Ill. Rev. Stats., ch. 3, pars. 20 and 21) alleged substantially that he was a resident of Illinois; that on or about October 3, 1926, Melbert W. Lorch, a resident of Chicago, disappeared from his home, has not been heard of or from since, and is presumed to be dead; that upon due and diligent search and inquiry, his place of residence cannot be ascertained and that his last known place of residence was 4914 Drexel boulevard, Chicago; that Melbert W. Lorch left no last will and testament; that he left a personal estate not to exceed $11,000 in life insurance

38474

IN THE MATTER OF THE ESTATE OF
MILBURN J. LORON,

STATE MUTUAL LIFE ASSURANCE
COMPANY, a corporation,
appellant,

v.

HENRY S. LORON,
appellee.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

By this special proceeding, the [illegible] Company of [illegible], [illegible] of the circuit court [illegible] affirming an order [illegible] Letters of administration [illegible] the presumed death of [illegible].

The petition [illegible] January 9, 1934, [illegible] Estates act ([illegible] 21) alleged [illegible] on or about [illegible] Chicago, [illegible] since, and is presumed [illegible] search and inquiry, [illegible] and that his last [illegible] Chicago; that [illegible] he left a personal [illegible]

carried by him with certain designated life insurance companies, including the New England Mutual Life Insurance Company, The Equitable Life Assurance Society of the United States and the appellant in this cause; that Melbert W. Lorch left him surviving as his only heirs at law and next of kin, Harry S. Lorch, a brother, and Wilma B. Morris, a sister; and prayed for the issuance of letters of administration to the petitioner.

May 22, 1934, the probate court, after a hearing, entered an order as of May 19, 1934, granting letters of administration to Harry S. Lorch in the estate of Melbert W. Lorch, based on the presumed death of the latter. Separate appeals to the circuit court were perfected from this order by the appellant and the other two respondent insurance companies heretofore mentioned. Although not consolidated, all three appeals were tried together in the circuit court and similar judgments entered in the three cases. Separate appeals were taken from the judgments of the circuit court and this appeal has been consolidated for hearing in this court with case No. 38488, the appeal of the New England Mutual Life Insurance Company.

The undisputed facts essential to the determination of the issues involved are that Melbert W. Lorch was thirty-three years old at the time of his disappearance October 3, 1926, and a bachelor; that he had theretofore been a normally healthy and happy young man; that he was an onion broker on a large scale and president of M. W. Lorch, Inc., 1421-1425 Solon street, Chicago; that he enjoyed a good reputation in his trade and was regarded as a "square shooter;" that he had maintained a home for his mother for ten years and at the time of his disappearance resided with her at 4914 Drexel boulevard; that in the latter part of September and the early part of October, 1926, his company was heavily indebted

carried by him with certain designated life insurance companies, including the New England Mutual Life Insurance Company, the Equitable Life Assurance Society of the United States and the appellant in this cause; that Walbert Y. Torch left him surviving as his only heirs at law and next of kin, Harry G. Torch, a brother, and Alma E. Morris, a sister; and prayed for the issuance of letters of administration to the petitioner.

May 22, 1934, the probate court, after a hearing, entered an order as of May 10, 1934, granting letters of administration to Harry G. Torch in the estate of Walbert Y. Torch, based on the presumed death of the latter. Separate appeals to the circuit court were perfected from this order by the appellant and the other two respondent insurance companies mentioned. Although not consolidated, all three appeals were tried together in the circuit court and similar judgments entered in the three cases. Separate appeals were taken from the judgments of the circuit court and this appeal has been consolidated for hearing in this court with cause No. 38878, the appeal of the New England Mutual Life Insurance Company.

The undisputed facts essential to the decision of the issues involved are that Walbert Y. Torch, a thirty-three years old at the time of his disappearance on [illegible], 1932, and a bachelor; that he had short [illegible] and happy young man; that he was an option broker on a large scale and president of M. J. Torch, Inc., 141 I-[illegible] Chicago; that he enjoyed a good reputation in his [illegible] as a "square shooter"; that he had maintained a home for his mother for ten years and at the time of his disappearance resided with her at 4014 Drexel Boulevard; that in the latter part of September and the early part of October, 1932, his company was heavily indebted

to other merchants and to banks; that on Saturday October 2, 1926, he went by train from Chicago to Cincinnati, Ohio, for the purpose of raising money to enable his firm to continue its business operations; that Alfred Jacobson, an employee of the Lorch Company, advanced him sufficient funds to make the Cincinnati trip and drove him to the railroad station in an auto owned by the company, retaining the car for his personal use; that Lorch telephoned Jacobson Sunday morning October 3, 1926, from Cincinnati, and told him that he was returning to Chicago that day on the day train, requesting that the auto be left for him at a designated garage on the south side; that he usually remained in Chicago, transacting business from his office, and that such trips out of town as he did make were never for more than a day or two; that he returned to Chicago, October 3, 1926, and secured the car from the garage where Jacobson had left it; that sometime after his return he went to his office and wrote reconsignment orders on certain cars of onions in transit and left his valuables, including a diamond stick pin, a diamond ring and a diamond watch, together with certain insurance policies, on his desk; and that no irregularities were found in the business of the Lorch Company, of which he was the head, and no shortage of that company's funds was discovered.

It further appeared that on Monday morning October 4, 1926, the auto heretofore referred to was found by the police at the foot of Quincy street and the Chicago river with its starter broken and Melbert W. Lorch's hat, topcoat, traveling bag containing the wearing apparel he had taken with him on his trip to Cincinnati, and a six or seven foot length of window sash cord on the rear seat of the auto; that a letter to "Speed" (a nickname of one Milton C. Coggins, a business associate of Lorch) was found on the front seat of the car next to the driver's seat; that on the same morning Jacobson found Lorch's jewelry and the insurance policies on the desk in Lorch's

to other merchants and [illegible] 1928, he went by train from [illegible] purpose of raising money to [illegible] nose operations; [illegible] Company, advanced him [illegible] trip and drove him to the rail [illegible] the company, retaining [illegible] telephoned Jacobson Sunday morning [illegible] 1930, from [illegible] and told him that he was returning [illegible] train, requesting that he [illegible] garage on the south side [illegible] transacting business [illegible] town as he did once were never [illegible] returned to Chicago, October [illegible] garage where Jacobson had left it; that [illegible] he went to his office and [illegible] case of omissions in transit and left his valuables, including diamond stick pin, a diamond ring and a diamond watch, together with certain insurance policies, on his [illegible] were found in the business of the Joroch Company, of which [illegible] head, and no shortage of that company's funds was discovered.

It further appeared that on Monday morning, October 6, 1930, the auto heretofore referred to was found by the police [illegible] of Quincy street and the Chicago River with it [illegible] Joroch and Halbert W. Joroch's box, topcoat, travelling bag containing the [illegible] appeared he had taken with him on his trip to Canada [illegible] six or seven feet length of window sash cord on the rear seat of the auto that a letter to "Jagod" (a nickname of one Allison [illegible] business associate of Joroch) was found on the front seat of the car next to the driver's seat; that on the same morning Jacobson found Joroch's jewelry and the insurance policies on the desk in Joroch's

private office; that Jacobson also found the telegraph orders written by Lorch, apparently on Sunday night, addressed to various railroads, reconsigning cars of onions to different people to whom the Lorch Company owed money; that the police dragged the river at the foot of Quincy street on Monday, October 4, 1926, the day that the car was discovered, but did not find the body of Lorch; that Tuesday, October 5, 1926, three notes in Melbert W. Lorch's handwriting on stationery of M. W. Lorch, Inc., one addressed to Harry Lorch, one to his mother and one to a Mr. Wagner of the Commerce Trust and Savings Bank, were turned over to the petitioner; that these notes were found under the front seat of the auto at the garage where Jacobson had taken it to have the started repaired; that Harry S. Lorch employed a diver who searched the river bottom all day Wednesday, October 6, 1926, for a block or more in each direction from Quincy street, but did not find the body; that no further search was made for the body in the river; that Harry S. Lorch made inquiries of the police as to where "the body could go;" that he directed them to notify the lock-keeper at Lockport, Illinois, to be on the lookout for the body of his brother; that the body did not turn up there and has never been found; that the police sent out a teletype message containing a description of Lorch; that Harry Lorch for about two years after his brother's disappearance made persistent inquiries among mutual friends and business associates of his brother, both in Chicago and other parts of the country where his travels took him, in an endeavor to ascertain his whereabouts, and he thereafter made such inquiries when and wherever he thought they would be of any avail; that in frequent talks with his mother she advised him that she had heard nothing from or of Melbert; that Wilma Morris, Melbert W. Lorch's sister, made frequent inquiries among friends, relatives and business associates as to whether or

private office that [illegible] written by Lorch, [illegible] railroad, [illegible] the Lorch Company [illegible] the foot of Quincy street on [illegible] the car was discovered, [illegible] Tuesday, October 5, 1937, [illegible] writing on stationery of [illegible] Lorch, one to his mother [illegible] Trust and Savings Bank, [illegible] these notes were found [illegible] the garage where Jacobson [illegible] that Harry Lorch employed [illegible] all day Wednesday, October 6, 1937, [illegible] direction from Quincy street, [illegible] further search was made for the body in [illegible] Lorch made inquiries of [illegible] that he directed them to notify the [illegible] to be on the lookout for the body [illegible] not turn up there and [illegible] a telotype message containing a description of [illegible] Lorch for about two years [illegible] persistent inquiries among [illegible] of his brother, both in this [illegible] his travels took him, in [illegible] and he therefore made much inquiry [illegible] they would be of any avail. [illegible] his mother [illegible] advised him that [illegible] William Morris, Walter W. Lorch's [illegible] among friends, relatives and [illegible] as to whether or

not any of them knew of the whereabouts of her brother, and they all gave her negative answers; that her mother, up to the time of her death, advised her that she had heard nothing from or of Melbert; and that neither Harry S. Lorch, Wilma Morris nor Alfred Jacobson had seen or heard of Melbert W. Lorch since his disappearance, and have not seen or heard of anybody else who had.

The $11,000 life insurance of Melbert W. Lorch was payable to his mother, Ella Lorch, as beneficiary. She died December 24, 1931, and it appears that she paid the premiums on this insurance until the time of her death. Melbert W. Lorch also carried $100,000 insurance on his life payable to M. W. Lorch, Inc. This company was adjudged bankrupt a few days after Lorch's disappearance.

Following are the four letters or notes which Melbert W. Lorch left in the automobile:

"Speed:

Goodbye - old boy - I know you will understand.

Lovingly,
Mel."

"Dear Harry:

Please have no funeral - just the Rabbi, you and Gus --. That's my last request and please stick to it.

There are all the insurance policies except one - on my desk - that one is in the N Y Life for $1000 and believe Mother has it. These I have here amount to $11000 in mother's favor.

The policies in the corp are also there. They can collect on $70,000 and a refund of premium on the one $30,000 that is less than a year old.

Mel."

"Mother Darling:

Please forgive what I am doing and do not grieve over me. I am going happily because it is the only honorable thing to do - I simply cannot let those who have had confidence in me lose by it and there's no other way out.

Your love and thoughtfulness have filled my life to the uttermost and after I have gone please bear up and remember you have two wonderful youngsters in Hermine & Junior to take my place.

A last big kiss and all my love.

Mel."

"Mr. Wagner:

Sorry to do this but there is no other way to keep you and my other friends from losing money - and since it was through your confidence in me - no step is too great to avoid abusing you.

The insurance money with our other assets should cover

not any of them knew of the wheereabouts of Lorch [illegible], and they all gave her negative answers; when her [illegible], at the time of her death, advised her that she had heard nothing from or of Halbert; and that neither Harry E. Lorch, Jr. nor Lyle Jacobson had seen or heard of Halbert E. Lorch since his disappearance, and have not been of benefit of anybody else who has.

The $11,000 life insurance of Halbert E. Lorch was payable to his mother, Ella Lorch, as beneficiary. He died [illegible] 24, 1931, and it appears that she paid the premiums on this insurance until the time of her death. Halbert E. Lorch also carried life insurance on his life payable to [illegible] Lorch, Inc. This company was adjudged bankrupt a few days after Lorch's disappearance.

Following are the four letters or notes which Halbert Lorch left in the automobile.

"Speed:

Goodbye - old boy - I know you will understand.
Lovingly,
Hal."

"Dear Harry:

Please have no funeral - just cremate, you and one --.
That's my last request and please stick to it.
There are all the insurance policies except one - on my desk - that one is in the $ Life for 1000 and believe Mother has it. Those I have here amount to $11000 in mother's favor.
The policies in the corp are also there. They can collect on $70,000 and a refund of premium on the 50,000 that is less than a year old.
Hal."

"Mother Darling:

Please forgive what I am going and do not grieve over me. I am going happily because it is the only honorable thing to do - I simply cannot let those who have had confidence in me lose by it and there's no other way out.
Your love and thoughtfulness have filled my life to the uttermost and after I have gone please keep up and remember you have two wonderful youngsters in Herman & Eunice to take my place.
A last big kiss and all my love.
Hal."

"Mr. Wagner:

Sorry to do this but there is no other way to keep you and my other friends from losing money - and since it was through your confidence in me - no step is too great to avoid causing you.
The insurance money with our other assets should cover

everything - Lindstrom our auditor can give you the figures on drafts due, outstanding a/c pay. and our various investments.

Wish I could put into words my gratitude for your many kindnesses and my regret that this step is necessary to do what is right.

Sincerely,
Mel."

The respondent insurance company contends that the evidence fails to establish that the disappearance and absence of Melbert W. Lorch are unexplained, fails to establish that due and diligent search and inquiry have been made for him since his disappearance and fails to establish that Melbert W. Lorch is actually dead, or, as a matter of law, legally presumed to be dead.

The petitioner's theory is that the evidence establishes that Melbert W. Lorch disappeared on or about October 3, 1926, from his home in Chicago; that he has not returned thereto since that date; that due and diligent search and inquiry have been made to ascertain his whereabouts, but without avail; that, inasmuch as his absence is unexplained and has continued for a period of more than seven years, under the law Melbert W. Lorch is presumed to be dead; and that the circuit court properly affirmed the order of the probate court granting letters of administration to the petitioner in the estate of Melbert W. Lorch based upon his presumed death.

Harry S. Lorch and his sister testified that it was their firm conviction that their brother Melbert had committed suicide. However, because his body was not discovered, it was impossible to prove his actual death. It is insisted by the respondent that all the circumstances surrounding the disappearance of Lorch, including the financial difficulties of his firm, the abandoned automobile containing the letters or notes and his effects, the failure to find the body and the large amount of insurance carried by him, are fairly and reasonably consistent with its theory that he voluntarily went into hiding to perpetrate a suicide hoax for the purpose of defrauding

everything - Industrial one, neither can give you the figures on drafts due, outstanding a/c pay, on our various investments.

Wish I could put into words my gratitude for your many kindnesses and my regret that this step is necessary to do what is right.

Sincerely,
Will."

The respondent [illegible] evidence [illegible] the evidence fails to establish that [illegible] Herbert W. Lorch are unexplained. While to establish [illegible] diligent search and inquiry has been made to find him since his disappearance and fails to establish that [illegible] Lorch is actually dead, or, as a matter of law, legally presumed to be dead.

The petitioner's theory is that the evidence establishes that Herbert W. Lorch disappeared on or about [illegible], 1929, from his home in Chicago; that he [illegible] since [illegible] that date; that due and diligent search [illegible] to ascertain his whereabouts, but without avail; [illegible] his absence is unexplained and has continued [illegible] period of more than seven years, under the law [illegible] Lorch is presumed to be dead; and that the circuit court properly [illegible] order of the probate court granting letters of administration to the petitioner in the estate of Herbert [illegible] Lorch [illegible].

Harry [illegible] Lorch and his [illegible] firm conviction that their brother [illegible] However, because his body was not [illegible], it was impossible to prove his actual death. It is [illegible] the respondent that all the circumstances surrounding the disappearance of Lorch, including the financial difficulties of his firm, the abandoned automobile containing the letters or notes and his effects, the [illegible] the body and the large amount of insurance carried by him, are fairly and reasonably consistent with the theory that he voluntarily went into hiding to perpetrate a suicide ruse for the purpose of defrauding

the insurance companies. It is further insisted that the facts and circumstances in evidence offer a sufficient and satisfactory explanation for both the disappearance and the continued absence of Lorch. The evidence does offer an explanation for his disappearance, but instead of reasonably accounting for his continued absence, we think, rather, that, coupled with his failure to return home and his failure to communicate with those with whom he would naturally communicate, if alive, it indicates a strong possibility of suicide.

All the circumstances connected with the disappearance of Lorch were admissible as competent evidence under the petition of Harry S. Lorch, which was predicated upon the theory of the presumed death of his brother, even though they tended to show suicide. Lorch was a normal, healthy and apparently happy young man. He was on affectionate terms with the members of his family. He lived with and maintained a home for his mother, to whom he was devoted. There is no evidence in the record of irregularity or dishonesty in his dealings with his own firm or others. He enjoyed an excellent reputation in his business relations. Respondent's argument that it may reasonably be inferred from the evidence that Lorch feigned suicide, went into hiding and continuously absented himself from his home and the members of his family up to the present time, successfully obliterating all trace of his whereabouts, to permit his relatives and his firm to collect his insurance, is not convincing. The insurance, of which his mother was the beneficiary, was hardly sufficient to compensate Lorch for any such voluntary exile, even though, if and when collected, the same should be surreptitiously turned over to him, and the insurance payable to his firm could have furnished no inducement for his continued absence, because in no event would it inure to his individual benefit.

There is ample evidence in the record to show that since

the insurance companies. It is rather interesting that the facts and circumstances in evidence offer a quite fair and [illegible] explanation for both the disappearance and the [illegible] death of Lorch. The evidence does offer an explanation of his disappearance, but instead of reasonably accounting for his continued absence, we think, rather, that, coupled with the failure to return home and his failure to communicate [illegible] which would naturally communicate, it [illegible] strongly corroborate possibility of suicide.

All the circumstances connected with the disappearance or death of Lorch were admissible as competent [illegible] and the petition of Harry S. Lorch, which was predicated upon the theory of the presumed death of his brother, even though it [illegible] to show suicide, Lorch was a normal, healthy and [illegible] man. He was on affectionate terms with the members of his family. He lived [illegible] and maintained a home for his mother, [illegible] brother. There is no evidence in the record of [illegible] in his dealings with his own firm or elsewhere. He [illegible] station in his business relations. [illegible] reasonably be inferred from the evidence [illegible] went into hiding and continuously thereafter [illegible] and the members of his family up to the [illegible] obliterating all trace of his whereabouts, or [illegible] and his firm to collect his insurance, [illegible] ance, of which his mother was the beneficiary, [illegible] to compensate Lorch for any such [illegible], even though, if and when collected, the [illegible] over to him, and the insurance payable to his firm could have furnished no inducement for his continued [illegible], because in no event would it inure to his individual benefit.

There is ample evidence in the [illegible] to show that since

the disappearance of Melbert W. Lorch October 3, 1926, due and diligent search and inquiry have been made to ascertain his whereabouts and that he has not returned to his home since that time. In our opinion, even though his disappearance is explained, that fact does not overcome the presumption of his death after his continued and unexplained absence for seven years.

The major question presented here was before this court in the comparatively recent cases of Piersol v. Massachusetts Mutual Life Ins. Co., 260 Ill. App. 578; Mueller v. Hancock Mutual Life Ins. Co., 280 Ill. App. 519; and Forster v. Hancock Mutual Life Ins. Co., (Appellate court case No. 38158 - opinion not published.) In the Piersol case the assured's accounts were being audited before he disappeared and a shortage was thereafter discovered, resulting in an indictment charging him with the embezzlement of $1,742.40. In the Mueller case the assured worked for the insurance company which was the defendant therein and wrote a letter to his wife the day after his disappearance admitting that he was "about $200 short on my book." In the Forster case there was hearsay evidence that the assured shot another man in a saloon; that this man thereafter died as a result of the bullet wound; and that in connection with the shooting a police officer secured a warrant for the arrest of Forster, who disappeared and remained away. It will be noted that the reason for the disappearance in each of these cases was far more compelling than in the instant case. Yet, it was held that, while the circumstances may have reasonably explained why the assured in the respective cases left his home, they did not afford sufficient explanation of his continued absence to rebut the presumption of his death.

After discussing and distinguishing many decisions of the courts of review of this state on the question, in Piersol v. Massachusetts Mutual Life Ins. Co., supra, the court held, p. 587:

the disappearance of [illegible] Lorch (October 6, 1926, [illegible]
diligent search [illegible]
whereabouts and that he has not [illegible]
time. In our opinion, even though [illegible]
that fact does not overcome the presumption of [illegible]
continued and unexplained [illegible]

The major contention [illegible]
the comparatively recent case of [illegible] Life Ins. Co., 260 Ill. App. 37 [illegible] Life Ins. Co., 280 Ill. App. 51; and [illegible] v. [illegible] Co., (Appellate court case [illegible] - [illegible]
the Pierson case the assured [illegible] more
he disappeared and a mortgage [illegible]
in an indictment charging him with the embezzlement of [illegible]
In the Mueller case the assured worked for the [illegible] company
which was the defendant herein [illegible] to his [illegible]
the day after his disappearance [illegible]
about on my book." In the Pierson [illegible]
that the assured also [illegible]
after died as a result of the audit [illegible]
with the absorbing a book - [illegible]
of Morsier, who disappeared [illegible]
that the reason for the [illegible]
far more compelling than in the instant [illegible]
that, while the circumstances [illegible]
assured in the respective [illegible]
sufficient explanation of his [illegible]
presumption of his death.

After discussing and distinguishing [illegible] of the
courts of review of this and other states on the subject, in Pierson v.
Massachusetts Mutual Life Ins. Co., supra, the court held, p. 587

"An examination of the cases indicates that the prerequisites which would justify a presumption of death are (1) that the person whose death is in question has disappeared from his last known abode, domicile or residence; (2) that he has neither returned thereto nor communicated with those with whom he would naturally communicate if alive; (3) that inquiry has been made at the last known place of abode of the persons who would naturally hear from him without obtaining information indicating that he is alive. Out of proof of such material facts a presumption of death arises as a matter of law, but it is a rebuttable presumption which may be disproved by evidence of facts tending to show that the party presumed to be dead is alive. See Jones, Commentaries on Evidence, 2nd ed., vol. 1, secs. 285-294; 8 R. C. L., pp. 708, 709, and see page 714."

In our opinion there is no inconsistency between the fact that the evidence points to the intention of Lorch to commit suicide and the legal presumption of his death from his disappearance and unexplained absence for more than seven years.

In 17 C. J., par. 7, p. 1169, after citing numerous authorities of this and other jurisdictions, it is said:

"The presumption of death from seven years absence does not preclude an inference that death may have occurred before the expiration of such period. * * * There are some cases, however, in which it is said that there is no presumption of death until the lapse of seven years, but as there were no circumstances in these cases tending to show that death may have occurred at an earlier period, they probably merely intended to hold that, ordinarily, no presumption of death arises until the lapse of the prescribed period and not to contradict the established doctrine that inference of an earlier date may be drawn where the circumstances are such as to justify it."

Henry Blech, one of the attorneys for the petitioner, was also the attorney for Melbert W. Lorch in his lifetime. It appeared that on October 1, 1926, Blech prepared and acknowledged a power of attorney for said Melbert W. Lorch. He was called as a witness by respondent, and after identifying the power of attorney and testifying as to its execution by Lorch and acknowledgment by him stated that after the lapse of nine years he was unable to recollect the circumstances under which the document was executed. During the course of his examination the witness was asked by counsel for respondent to relate his conversation with Lorch at the time the power of attorney was drawn. Blech objected to answering on the ground that such conversation between attorney and client was privileged. The trial

"An examination of the cases indicates that the presumption which [illegible] that the person whose death is in question has disappeared from his last known [illegible] neither returned thereafter [illegible] be found alive [illegible] has been made at the last known [illegible] would need [illegible] indicating that he is alive. The [illegible] of proof of such material facts a presumption of [illegible] of life, but it is a rebuttable presumption [illegible] by evidence of facts tending to show [illegible] alive. See Jones, Commentaries on Evidence [illegible] cases, 388-394; [illegible] Vol. VI."

In our opinion [illegible] is no [illegible] that the evidence points to [illegible] and the legal presumption [illegible] unexplained absence for more than seven years.

In IV [illegible], pars. V, [illegible], after citing [illegible] authorities of this and other jurisdiction, [illegible]:

"The presumption of death from seven years' absence does not preclude an inquiry [illegible] the expiration of such period. [illegible] however, in which it is said that [illegible] the lapse of seven years, but [illegible] these cases [illegible] earlier period, they [illegible] ordinarily, no [illegible] prescribed [illegible] that inference of [illegible] absences are such [illegible]."

Henry Bloch, one [illegible] also the attorney [illegible] that on October 1, 1947, [illegible] of attorney for said [illegible] by respondent, and [illegible] as to its execution by [illegible] after the lapse of nine years [illegible] circumstances under which [illegible] of his examination [illegible] to relate his [illegible] was drawn. Bloch did [illegible] conversation between attorney and client [illegible]. The trial

court sustained the objection and respondent contends that such ruling was prejudicial and erroneous.

This contention is answered in Scott v. Harris, 113 Ill. 447, a case cited by respondent, where the court said at p. 454:

"Mr. Asay was the attorney at law and legal advisor of Jacob Harris in his lifetime, and all that was said to him by Harris in regard to the execution of the deeds, and his intention in that respect, was said to him in that capacity. Mr. Asay, himself, objected to testifying to these declarations, and the counsel for Rachel Ann Harris also objected thereto, upon the ground that they were privileged communications. The chancellor admitted the evidence, subject to the objections. If Harris were himself alive, interposing the objection, counsel for complainants concede the evidence would be inadmissible, but they contend that inasmuch as he is dead, and the inquiry is simply to ascertain, as between the legatees under his will and the grantee claiming under his deeds, what he intended by his deeds, the rule for excluding the evidence does not apply. This position has support in Russell v. Jackson, 9 Hare, 387, and Blackburn v. Crawford, 3 Wall, 175, although where the rights and interests of clients, and those claiming under them, and third persons, come in conflict, the privilege is not removed by the client's death. In case of testamentary disposition, the rule seems to be otherwise." (Italics ours.)

Lorch left no will and it would appear from the italicized portion of the language of the preceding opinion that, after his presumed death, the "rights and interests" of petitioner and his sister, claiming under him, being in conflict with those of the third person respondent, the privilege attendant upon the relation of attorney and client was therefore "not removed by the client's death." Authorities are cited by respondent to the effect that statements made by a deceased client to his attorney as to his reasons for wanting a legal instrument drafted are not privileged communications. It is conceded that this is the rule, but the question asked the witness was not restricted to such statements and the objection was properly sustained.

Plaintiff's undisputed evidence as to the material facts was ample to give rise to the presumption of death as a matter of law, and inasmuch as the record discloses no evidence that Melbert W. Lorch is alive the trial court properly affirmed the order of the probate court granting letters of administration to Harry S.

court sustained the objection and remanded concerning that such ruling was prejudicial and erroneous.

This construction is answered in _Lopez v. Martin_, 111 111, 447, a case cited by respondent, where the court said at p. 450:

"Mr. Amey was the attorney at law and legal adviser of Jacob Martin in his lifetime, and his alone was paid to him by Martin in regard to the execution of the deeds, and his information in that respect, was said to him in his capacity, Mr. Amey, his-said, objected to testifying to these declarations, and the counsel for Jacob Jan Martin also objected thereto, upon the ground that they were privileged communications. The chancellor sustained the evidence, subject to the objections. If Martin were literally active, interpreting the objection, counsel for complainants argued the evidence would be incompetent, but they insisted that lawyers as he is dead, and the inquiry is mainly to ascertain, in business the lawyers under his will and who grantees claiming under his deeds, what he intended by his deeds, for such construing the evidence does not apply. This position has support in _Lawrence v. Lawrence_, 3 Ill. App. 327, and _Blackburn v. Crawford_, 3 Ill. 566, although there the rights and interests of children, who claim adversely under him, and third persons, come in question, the privilege is not removed by the client's death. In case of testamentary disposition, the rule seems to be otherwise." (Italics ours.)

Lopez left no will and it could appear from the italicized portion of the language of the preceding opinion that, after his presumed death, the "rights and interests" of creditors and his sister, claiming under him, being in conflict with those of the third person respondents, the privilege attendant upon the relation of attorney and client was therefore "not removed by the client's death." Authorities are cited by respondent in the effect that statements made by a deceased client to his attorney or to an _[illegible]_ for making a legal instrument testify are not particularly assuming. It is conceded that this is the rule, but the question which the court here was not restricted to such statements as the objection was properly sustained.

Plaintiff's contention which [illegible] the material facts was simply to give rise to the presumption of truth of a matter of law, and inasmuch as the record discloses no evidence that Mathers V. Lopez is alive the trial court properly sustained the order of the probate court granting letters of administration to Harry S.

Lorch in the estate of his brother Melbert W. Lorch.

Other points have been urged and considered, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated the judgment of the circuit court is affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

Lorch in the estate of [illegible]

Other points have been [illegible]

view we take of [illegible]

For the reasons [illegible] the [illegible] of the trial court is affirmed.

[illegible]

Cardozo, P. J., and [illegible] concur.

38487

In the Matter of the Estate of MELBERT W. LORCH.

THE EQUITABLE LIVE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation,
Appellant,

v.

HARRY S. LORCH,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

285 I.A. 596

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal respondent, Equitable Life Assurance Society of the United States, seeks to reverse the judgment of the Circuit court, entered after a trial de novo without a jury, affirming an order appealed from the Probate court, which granted Letters of Administration to Harry S. Lorch, petitioner, upon the presumed death of his brother, Melbert W. Lorch.

The opinion in case No. 38474 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 38474. The judgment rendered below in that case was the same as in this and the same questions are presented for review. Our decision in that case (Lorch v. State Mutual Life Assurance Company) controls the questions presented here, and for the reasons there stated the judgment of the Circuit court in this cause affirming the order of the Probate court granting Letters of Administration to Harry S. Lorch in the estate of his brother, Melbert W. Lorch, is affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

38487

In the Matter of the Estate of
MARGARET V. LORCH.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
a Corporation,

Appellant,

v.

HARRY S. LORCH,

Appellee.

[illegible]

[illegible]

28 Ill. A. 396

MR. JUSTICE [illegible] delivered the opinion of the Court.

By this appeal respondent, [illegible] contends solely of the United States, seeks to reverse the judgment of the Circuit court, entered after a trial de novo without a jury, affirming an order appealed from the Probate Court, [illegible] matters of Administration to Harry S. Lorch, petitioner, upon the presumed death of his brother, Walbert V. Lorch.

The opinion in case no. 38474 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 38474. The jurisdiction of the Probate court in that case was the same as in this and the same questions are presented for review. [illegible] decision in that case (Lorch v. [illegible] Life Insurance Company controls the questions presented here, and for the reasons there stated the judgment of the Circuit court [illegible] this cause affirming the order of the Probate Court [illegible] Administration to Harry S. Lorch in the estate of his brother, Walbert V. Lorch, is affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

38488

In the Matter of the Estate of
MELBERT W. LORCH.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Appellant,

v.

HARRY S. LORCH,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

285 I.A. 596

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal respondent, New England Mutual Life Insurance Company, a corporation, seeks to reverse the judgment of the Circuit court, entered after a trial de novo without a jury, affirming an order appealed from the Probate court, which granted Letters of Administration to Harry S. Lorch, petitioner, upon the presumed death of his brother, Melbert W. Lorch.

This cause was consolidated for hearing in this court with case No. 38474. The opinion in case No. 38474 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 38474. The judgment rendered below in that case was the same as in this and the same questions are presented for review. Our decision in that case (Lorch v. State Mutual Life Assurance Company) controls the questions presented here, and for the reasons there stated the judgment of the Circuit court in this cause affirming the order of the Probate court granting Letters of Administration to Harry S. Lorch in the estate of his brother, Melbert W. Lorch, is affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

38488

In the Matter of the Estate of
MELBERT B. LOVGN.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY, a Corporation,
Appellant,

v.

MARY S. LOVGN,
Respondent.

APPEAL FROM [illegible] COUNTY.

[illegible] J.

[illegible] J. [illegible] and [illegible] J., concur.

POSTIA 396

MR. JUSTICE BRILLIANT DELIVERED THE OPINION OF THE COURT.

By this appeal respondent, Mary Lovgn, claimed with Prudence Life Insurance Company, a corporation, seeks to reverse the judgment of the Circuit court, entered after a trial de novo without a jury, affirming an order appealed from the Probate court, which granted letters of Administration to Mary S. Lovgn, petitioner, upon the presumed death of his brother, Melbert B. Lovgn.

This cause was consolidated for hearing in this court with case No. 38474. The opinion in case No. 38474 . filed currently with this opinion. The facts in this case are identical with the facts in case No. 38474. The last part is found below in that case was the same as in this and the same questions are presented for review. Our decision in that case (Lovgn v. Prudence Mutual Life Insurance Company) controls the conclusion presented here, and for the reasons there stated the judgment of the circuit court in this cause affirming the order of the Probate court granting letters of Administration to Mary S. Lovgn in the estate of his brother, Melbert B. Lovgn, is affirmed.

AFFIRMED.

Dossman, P. J., and Friend, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 596 3

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 8972. AGENDA NO. 35.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1936.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF JAMES LARKINS, deceased.

CITY TRUST AND SAVINGS BANK, as Executor of the Last Will and Testament of James Larkins, deceased,

Appellant,

vs.

NOLIA EYRICH, et. al.,

Appellees.

APPEAL FROM CIRCUIT COURT KANKAKEE COUNTY.

HUFFMAN - P. J.

This is an appeal from an order of the court entered upon objections filed to appellant's final report, with respect to claim made for Executor's fees and attorney's fees. The appellant was named as executor of the estate of James Larkins, deceased, in his last will and testament. It accepted the trust and acted as such executor. On July 19, 1934, appellant filed its final report as such executor in the probate court of Kankakee County. The report contained an item of $7000 as a charge to be allowed for executor's fees and attorney's fees. Objection was filed to the report in this respect and the probate Judge being disqualified to hear the case, the matter was heard by the circuit court of said county. The court found that the sum of $3000 was a fair and reasonable amount to be allowed and paid to appellant in full for its fees and com-

GRM. No. 8972.

IN THE MATTER OF [illegible]
TESTAMENT of [illegible], deceased.

[illegible]
Executor of the last will and Testa-
ment of James Watkins, deceased.

[illegible]

vs.

NOLLA EARLOW, et. al.,

[illegible]

HUFFMAN - P. J.

This is an agreed [illegible] upon objections filed to preliminary final report, [illegible] made for Executor's fees [illegible] attorney's fees. [illegible] named as executor of the estate of [illegible], in his last will and testament. [illegible] executor. On July 22, 1[illegible], [illegible] such executor in t[illegible] contained an item of [illegible] fees and attorney's fees. [illegible] this respect and the [illegible] case, the matter [illegible] court. The court found that [illegible] to be allowed and [illegible] fee and con-

missions as executor, including attorney's fees. Appellees filed objections other than those directed toward the $7000 item. All of the objections filed were overruled except as to the above item of executors and attorney's fees. The appellant has prosecuted its appeal from the order of the court made with reference thereto. Appellees assign cross errors as to the objections overruled.

Sec. 133 of the Administration Act provides for compensation to executors and administrators. Costs and expenses of the character involved herein are incident to the administration of an estate, and usually included in the credit allowed the administrator or executor for such administration. In re: Estate of Thurber, 311 Ill. 211; Sprinkle v. Forrester, 162 Ill. App. 45;, Mercy Hospital v. Wright, Executor, 213 Ill. App. 634. It is customary for the administrator or executor of an estate to employ such counsel as is reasonably necessary to bring about a proper administration of the estate and to wind up the business thereof. The law intends that reasonable fees shall be allowed for such services, to be paid from the funds of the estate.

There was approximately $70,000 of personal property administered upon. While a proper amount for such items of costs of administration is of necessity largely within the discretion of the trial court, yet the law permits an administrator or executor to employ competent counsel and contemplates that reasonable fees shall be paid for such services. This court is very reluctant to make any change in the amount as fixed by the trial court. Yet after due consideration, we are of the opinion that the sum of $5000 would be a reasonable allowance under the facts as they appear from the record in this case. We have examined the cross error assigned by appellees and are satisfied with the ruling of the court in that respect.

The order and judgment of the trial court is reversed and judgment entered her upon the claim of appellant as filed, for the sum of $5000, to be paid in due course of administration.

Judgment of trial court reversed and judgment entered here.

misdeed as executor, including [illegible]

objections other than those [illegible]

of the objections filed were overruled [illegible]

executors and attorneys' fees. [illegible]

appeal from the order of the court [illegible]

pellees assign cross errors [illegible]

Sec. 1001 of the Judicial Code [illegible]

to executors and administrators. [illegible]

involved herein are inherent in the [illegible]

usually included in the order allowing [illegible]

for such administration. In re [illegible]

Pringle v. Burnette, [illegible] 111. [illegible]

Executor, 215 111. App. [illegible]

or executor of [illegible]

essary to bring about [illegible]

ving up the business thereof. [illegible]

shall be allowed for such services, [illegible]

the estate.

There was approximately [illegible]

upon. While [illegible]

e of necessity [illegible]

et the law [illegible]

sonnel and contempt [illegible]

services. This court [illegible]

amount as fixed by [illegible]

e are of the opinion [illegible]

allowance under [illegible]

e have examined [illegible]

fied with the [illegible]

The order and judgment [illegible]

judgment entered [illegible]

um of $5000, to [illegible]

Judgment of [illegible] entered [illegible]

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

GEN. NO. 8972 AGENDA NO. 36

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A.D. 1935.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF JAMES LARKINS, deceased.

CITY TRUST AND SAVINGS BANK, as Executor of the Last Will and Testament of James Larkins, deceased,

Appellant,

vs.

APPEAL FROM CIRCUIT COURT KANKAKEE COUNTY.

NOLIA EYRICH, et al,

Appellees.

HUFFMAN - P.J.

This is an appeal from an order of the court entered upon objections filed to appellant's final report, with respect to claim made for executor's fees and attorney's fees. The appellant was named as executor of the estate of James Larkins, deceased, in his last will and testament. It accepted the trust and acted as such executor. On July 19, 1934, appellant filed its final report as such executor in the probate court of Kankakee county. The report contained an item of $7000 as a charge to be allowed for executor's fees and attorney's fees. Objection was filed to the report in this respect and the probate Judge being disqualified to hear the case, the matter was heard by the circuit court of said county. The court found that the sum of $3000 was a fair and reasonable amount to be allowed and paid to appellant in full for its fees and commissions as executor,

No. 8[illegible]

IN THE MA[illegible]
TESTAMENT [illegible]

CITY TRUS[illegible]
ector of [illegible]
of James Ha[illegible]

[illegible]

vs.

WOLLA HYAMS, et al.

[illegible]

HUTTMAN - [illegible].

This is [illegible]
upon objection [illegible]
to claim made for [illegible]
appellant was [illegible]
deceased, in his [illegible]
and acted as such [illegible]
its final report [illegible]
Kee county. The report [illegible]
to be allowed for [illegible]
was filed to [illegible]
being disqualified [illegible]
the circuit court [illegible]
of $3000 was a fair and [illegible]
to appellant in full for his [illegible]

including attorney's fees. Appellees filed objections other than those directed toward the $7000 item. All of the objections filed were overruled except as to the above item of executor's and attorney's fees. The appellant has prosecuted its appeal from the order of the court made with reference thereto. Appellees assign cross errors as to the objections overruled.

Sec. 133 of the Administration Act provides for compensation to executors and administrators. Costs and expenses of the character involved herein are incident to the administration of an estate, and usually included in the credit allowed the administrator or executor for such administration. In re: Estate of Thurber, 311 Ill. 211; Sprinkle v. Forrester, 162 Ill. App. 45; Mercy Hospital v. Wright, Executor, 213 Ill. App. 634. It is customary for the administrator or executor of an estate to employ such counsel as is reasonably necessary to bring about a proper administration of the estate and to wind up the business thereof. The law intends that reasonable fees shall be allowed for such services, to be paid from the funds of the estate. The proper amount to be allowed is, of necessity, largely within the discretion of the probate court. When such court has exercised its judgment in the matter, only a plain case of an abuse of discretion or of the wrongful exercise of judgment, should justify a court of review in disturbing such allowance. Griswold v. Smith, 214 Ill. 323.

There was approximately $70,000 of personal property administered upon. Over $55,000 of this amount was represented by certificates of deposit in banks; over $6,000 in liberty bonds; and over $5,000 paid to the estate upon a claim. There was nothing difficult in the settlement of this estate. The securities were in a liquid state and such as could be administered upon with the greatest of ease. However, the law permits an

including attorney's fees. [illegible]
than those directed [illegible]
objections filed [illegible]
of executor's and attorney's fees.
its appeal from the order [illegible]
to. Appellees contend [illegible]

Sec. 142 of the [illegible]
penalties to executors and [illegible]
of the character intended [illegible]
of an estate, and usually [illegible]
administrator or [illegible]
Estate of Thrift, 221 Ill. 311; [illegible]
App. 42; Henry [illegible] v. [illegible]
It is contended by the [illegible]
to empty, and [illegible]
a proper court to [illegible]
thereof. The [illegible]
for such service, [illegible]
proper amount to be allowed [illegible]
discretion of the [illegible]
its judgment in the matter, [illegible]
discretion or of the [illegible]
justify a court of review [illegible]
v. Smith, 214 Ill. 482.

[illegible]
administrator [illegible]
by certificates of deposit [illegible]
bonds; and were [illegible]
was nothing [illegible]
securities were [illegible]
upon with the [illegible]

administrator or executor to employ competent counsel and reasonable fees shall be paid for such services.

While we are of the opinion that the allowance in this case is an extremely modest one, yet the trial court had the advantage of personal knowledge of the matters that had transpired in the course of administration, and his judgment as to the allowance of fees and commissions is entitled to great weight. We do not feel warranted in disturbing the order of the court, entered as above. We have examined the cross error assigned by appellees and are satisfied with the ruling of the court in that respect.

The order and judgment of the trial court is therefore affirmed.

Order and judgment affirmed.

administrator or executor to [illegible] reasonable fees shall be paid [illegible].

While we are [illegible] this case is an extremely [illegible] the advantage of [illegible] transferred in the course of [illegible] as to the allowance or fees [illegible] to great [illegible] order of the court, entered [illegible] cross error assigned by appellees [illegible] ruling of the court in that regard.

The order and judgment [illegible] affirmed.

Order [illegible].

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 596

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9027. AGENDA NO. 6.

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM. A.D. 1936.

CLETUS RIELLY, a Minor, by
MARTHA RIELLY, his mother
and next friend,

Appellant,

vs.

FANNIE HAMILTON,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF WINNEBAGE COUNTY.

HUFFMAN - P.J.

This was an action brought by appellant, by his mother as next friend, to recover damages for personal injuries sustained by him in a collision between a bicycle which he was riding, and an automobile being operated by appellee.

This case was before this court at the May term, 1934, at which time the cause was reversed and remanded with a finding that the verdict was contrary to the weight of the evidence. Cletus Rielly, a minor, by Martha Rielly, his mother and next friend, v. Fannie Hamilton, 276 Ill. App. 605 (Abs.). A statement of the facts was fully set out in the former opinion. Upon review of the record in this case we do not find a sufficient difference in the essential facts to justify a restatement thereof in this opinion. Briefly stated: The appellant was riding his bicycle north on Main street in the city of Pecatonica, on June 14, 1933. He was riding along the

GEN. NO. 3029.

[illegible]

[illegible]

CLEVELAND RIELLY, [illegible],
MARTHA RIELLY, [illegible] with [illegible]
and next friend,

[illegible]

vs.

FANNIE HAMILTON,

[illegible].

HUTTMAN - J.C.

This was an action [illegible]
next friend, to recover [illegible]
him in a collision between [illegible]
automobile being operated by [illegible].

This case was before this [illegible]
which time the same was [illegible]
the verdict was contrary to [illegible]
Rielly, a minor, by [illegible]
Fannie Hamilton, Pro Ten. [illegible]
was fully set out in the [illegible]
in this case we do not [illegible]
facts to justify a reversal [illegible]
stated: The appellee was [illegible]
in the city of Scottsville, [illegible]

west side of said street. This was a paved street running north and south and was intersected by Fourth street, running east and west. The appellant was approaching the intersection of these two streets from the south, riding his bicycle north on Main street along the west side thereof as aforesaid. Appellee was operating her automobile south on Main street and upon the west side thereof and approaching the intersection of Main and Fourth streets from the north. As appellee came to the intersection of these two streets, she turned her automobile west to her right, upon Fourth street. Appellant saw appellee's automobile approaching this intersection toward which he was riding upon his bicycle. When appellant reached the intersection of the two streets, he continued to ride his bicycle out into the intersection, turned it to his left on Fourth street, which was toward the west, with the result that a collision occurred, for which he brings this suit. The accident happened at about 11:00 o'clock in the morning. The weather was clear and the streets were dry. Appellant's view was unobstructed. He saw appellee approaching the intersection. Without diminishing his speed, he rode his bicycle into the street, and as we are convinced from the evidence into the side of appellee's automobile, after she had turned the same from Main street west into Fourth street.

Upon the trial of this case, the court granted appellee's motion at the close of all evidence, for a directed verdict. The appellant appeals therefrom. It is urged by appellant that the trial court must take the evidence in its most favorable light and with all inferences that could justly be drawn therefrom, in passing upon such a motion and urges that the trial court committed error in the granting of the motion in this case. The above rule is a well recognized one, yet where the evidence, with all inferences that the jury could justly draw therefrom, is so insufficient that the

west side of said street. [illegible]
south and was intersected by [illegible]
The appellant was [illegible]
from the south, [illegible]
west side thereof [illegible]
mobile south on said [illegible]
ing the intersection [illegible]
spolice came [illegible]
her automobile west to [illegible]
saw appellant's automobile [illegible]
he was riding upon [illegible]
section of the [illegible]
into the intersection, [illegible]
was toward the west, [illegible]
which he brought [illegible]
clock in the [illegible]
dry. Appellant's view [illegible]
ing the intersection. [illegible]
bicycle into the street, [illegible]
into the side of appellant's [illegible]
same from his car at west [illegible]

Upon the trial [illegible]
motion of the [illegible]
The appellant's [illegible]
trial court [illegible]
and with all [illegible]
passing upon such [illegible]
error in the [illegible]
a well recognized one, [illegible]
that the jury could [illegible]

court would not permit a verdict to stand, if returned, then the court is not bound to submit the case to the jury, but may direct a verdict. Simmons v. Chicago and Tomah R. R. Co. 110 Ill. 340, 346. To the same effect is the case of Greenless v. Allen, 341 Ill. 262.

After a review of the record in this case, we are of the opinion that the facts presented on behalf of appellant, are insufficient to sustain a verdict. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

court would not permit a verdict to stand, if [illegible]. [illegible] not bound to submit the case to the jury, but may [illegible].

Simmons v. Chicago and [illegible] R. R. Co., [illegible] Ill. [illegible], [illegible]. [illegible] effect is the case of [illegible] v. [illegible], [illegible].

After a review of the [illegible] in this case, [illegible] opinion that the facts [illegible] on behalf of appellant are insufficient to sustain a verdict. The judgment of the [illegible] court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 597

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9039. AGENDA NO. 12.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1936.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel HARRY H. HOLTZ,

Appellee,

vs.

APPEAL FROM THE CIRCUIT COURT
KANKAKEE COUNTY.

CITY OF KANKAKEE, a Municipal Corporation, et al.,

Appellants.

HUFFMAN - P. J.

Appellee filed his petition for mandamus against appellants, seeking reinstatement as a member of the fire department of appellant city. Appellants filed their motion to dismiss the petition for want of sufficient averments therein going to show a clear right to the writ sought. The court overruled the motion to dismiss. Appellants elected to stand by same, whereupon the court gave judgment for the petitioner and against the appellants and ordered the writ of mandamus to issue as prayed. Appellants prosecute this appeal from the judgment of the court.

Appellee by his amended petition alleged his citizenship and residence; the incorporation of appellant city; certain sections of the City Code establishing the fire department of said city; the adoption by the city of the Fire and Police Commissioners Act of 1903, (ch. 24, sec. 843, S-H, Sec. 958, Ill. St., 1935), on Sept. 4, 1928, and the continuance thereof from that time to the time of the

GEN. NO. 9039.

IN [illegible] DISTRICT

[illegible] TRICT

[illegible] NY [illegible], D. 1939.

PEOPLE OF THE STATE [illegible],
ex rel HARRY H. HOLT,

Appellants,

vs.

[illegible] COURT
[illegible].

CITY OF KALAMAZOO, a [illegible] cor-
poration, et al.,

Appellees.

HUFFMAN - P. J.

Appellee filed his petition for mandamus against appellants, seeking reinstatement as a member of the fire department of appellant city. Appellants filed their motion to dismiss the petition for want of sufficient averments wherein going to show [illegible] right to the writ sought. The court overruled the motion to [illegible]. ~~xxx~~ Appellants e eted to stand by same, whereupon the court gave judgment for the petitioner as against the appellants [illegible] ordered the writ of mandamus to issue as prayed. Appellants [illegible] this appeal from the judgment of the court.

Appellee by his amended petition alleged his [illegible] and residence; the incorporation of appellant city; [illegible] of the City Code establishing the fire department [illegible] the adoption by the city of [illegible] Police [illegible] of 1903, (cn. 94, sec. 6&8, [illegible]), [illegible], 111. [illegible], [illegible], 4, 1928, and the continuance thereof [illegible] time of the

filing of the petition; the organization of the first board of Fire and Police Commissioners, their continued successors, together with the rules and regulations adopted by the first board in accordance with the terms of the above Act, showing the classification by which all positions in the fire department were classified, together with amemdments as made from time to time thereto; that the petitioner was a member of the fire department of said city at the time of the adoption of the Fire and Police Commissioners Act on Sept. 4, 1928, and that he had so been a member of such fire department for more than one year prior thereto and had continuously served as a member thereof in capacity of a fireman to May 4, 1935; that he took the examination prescribed by the Board of Fire and Police Commissioners, passed the same, and was on August 7, 1933, appointed and certified by said Board of Commissioners as a member of the fire department of said city in the classified service of the same; that as such member he filed his bond and oath as required, and that thereafter said board posted a roster of the permanent members of said fire department and that the name of said petitioner appeared thereon; alleges the official capacity of the municipal officers, including the members of said Board of Commissioners; alleges that the Mayor of such city on May 1, 1935, arbitrarily, illegally and without reasonable or probable cause, in disregard of the Act as adopted by said city, appointed other persons to fill the positions of firemen in the fire department, including the position held by the petitioner; that the petitioner did not comply with the request of the Mayor to resign his position; and that the petitioner and the other members of the fire department refused to resign in compliance with the Mayor's request, and remained on duty as well as the persons appointed by the said Mayor in their stead; that the Board of Commissioners appeared before the Mayor and informed him that the petitioner whose resignation he had demanded was not subject to removal except under the terms of the Act which had been adopted by said city, but that the Mayor arbitrarily

and illegally refused to recognize the petitioner as a member of the fire department. The petition then sets out that the Mayor removed the existing Board of Commissioners whose terms had not expired, on the grounds that the interests of the city demanded such removal, and appointed other persons in their stead as commissioners; that the newly appointed Board of Commissioners met and adopted a resolution suspending the petitioner and the other members of the fire department whom the Mayor had sought to remove by his demand for their resignation. The petition then sets out the resolution of the new Board of Commissioners wherein they find that the City has two sets of fireman, and proceeds to name the newly appointed firemen, resolving that the former members of the fire department were suspended without pay until the further action of the commission. Petitioner shows notice of such resolution as being served upon him; that subsequent thereto he appeared before the Board of Commissioners and requested it not to suspend him until the former Board of Commissioners had been called before the present board; that this request was refused; that petitioner reported daily at his usual place of employment for the purpose of performing his duties as a member of the fire department, and was denied such right. The petitioner alleges that the action of the new Board of Commissioners in suspending him was illegal and void; that it was the duty of such board to inquire into and investigate the rights of the petitioner, and permit him to establish his rights to the position as fireman in the classified service of the department; that the board wholly refused so to do; and alleging a written demand served upon the board to restore him to his position. The petition alleges that no written charges were filed with the board against the petitioner and that it had no right to remove or discharge him for cause, except upon written charges, and after he had been permitted to be heard in his own defense. Allegation

nd illegally refused to recognize the petitioner [illegible]
ire department. The petition then sets out [illegible] never
he existing board of commissioners [illegible], on
he grounds that the [illegible] city [illegible], and
ppointed other persons in their stead as [illegible]; the
wly appointed board of commissioners met and [illegible] action
uspending the petitioner and the other members of [illegible] department
nt whom the Mayor had not [illegible] to remove by his [illegible]
ssignation. The petitioner then sets out the [illegible] new
oard of commissioners thereby [illegible] the then [illegible] sets
f firemen, and proceeds to [illegible] newly appointed firemen, re-
iving that the former members of the fire department were suspend-
without pay until the [illegible] of the commission. Petitioner
ows notice of such resolution as being served upon him; that sub-
sequent thereto he appeared before the Board of Commissioners and
epeated it not to suspend him until the former Board of Commission-
s had been called before the present board; that [illegible] was
refused; that petitioner reported daily at his [illegible] employ-
nt for the purpose of performing his duties as [illegible] fire
partment, and was denied such right. The petitioner [illegible] that
e action of the new board of commissioners in [illegible] was
illegal and void; that it was [illegible] duty of such [illegible] into
d investigate the rights of the petitioner, [illegible]
stablish his rights to the [illegible] as fireman [illegible]
rvice of the department; that the board wholly [illegible];
d alleging a written [illegible] upon the [illegible] to
a position. The petition alleges that no written [illegible]
th the board against the petitioner [illegible] that [illegible] re-
ve or discharge him for cause, [illegible]
ter he had been permitted to be [illegible]. [illegible]

is made as to the annual appropriation ordinance for the appropriation of money for the payment of salaries of the members of the fire department. Other and detailed averments are incorporated in the petition going to establish the right of petitioner for the writ prayed.

We have examined the authorities cited by appellants and have carefully considered all the points and propositions argued by them. We are of the opinion that the petition fairly establishes the right of the petitioner to the writ. The motion filed by appellants was in effect a demurrer, and therefore admitted all facts well pleaded by the petition. The judgment of the circuit court of Kankakee County is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 597 2

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN.NO. 9043 AGENDA NO. 15.

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A. D. 1936.

ALFRED MESS,

Appellant,

vs.

SETH L. PETTIT,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF ROCK ISLAND COUNTY.

HUFFMAN - P. J.

Appellant brought suit against appellee because of peroperty damages sustained as the result of a collision between a motor truck owned by appellant and one owned and operated by the appellee. The complaint consisted of fourteen paragraphs. Appellee filed his motion to compel appellant to make certain paragraphs of the complaint more specific. This motion was denied as to all paragraphs of the complaint except paragraph 13. The appellant elected to stand by his complaint and judgment was entered on the pleadings in favor of the appellee and against appellant for costs.

Paragraph 13 of the complaint is as follows:

"13. That at said time and place defendant did one or the other of the following acts and thereby caused the collision and injuries aforesaid;

(a) Wantonly or maliciously drove said motor truck then being driven by him at an excessive rate of speed across said railroad crossing and into the motor truck of the plaintiff, having no regard for the safety of others.

(b) Drove said motor truck then being operated by him at a speed greater than was reasonable having regard for the traffic and the use of the way, and at a speed which endangered persons rightfully on said highway, contrary to Sections 22 and 23 of the Motor Vehicle Law of Illinois.

(c) Negligently drove said motor truck at a dangerous rate of speed approaching and crossing said railroad crossing.

(d) Negligently drove said motor truck with defective brakes and was unable to slacken the speed of said motor truck due to the condition of the brakes.

(e) In approaching the motor truck of the plaintiff negligently failed to keep to his right of the traveled portion of said street or highway.

(f) Negligently drove and operated said motor truck without keeping a proper watch or lookout ahead to observe other persons and vehicles upon and using said street or highway there.

(g) Negligently drove and operated said motor truck to the left, as viewed from the position of the driver of his said motor truck, of the paved portion of said street or highway.

(h) Otherwise so negligently managed and operated said motor truck while approaching the motor truck of the plaintiff that it ran into the motor truck of the plaintiff."

The appellee complains of the fact that the allegations in the above paragraph were indefinite and uncertain for the reason they were stated in the alternative and therefore that said defendant could not properly answer the same nor prepare for trial with any certainty as to what acts of negligence the plaintiff would seek to prove against him. Para. 43 of the present Practice Act of this state, Ch. 110, Sec. 167, S-H 1935, provides that a litigant may aver his claim or defense in the alternative. This was evidently in order to avoid variances which could not be foreseen, and to thus

(b) [illegible]

(c) [illegible]

(d) [illegible]

(e) [illegible]

(f) [illegible]

(g) [illegible]

(h) [illegible]

The [illegible]

[illegible] above were [illegible]

[illegible] stated in [illegible]

[illegible] not [illegible]

[illegible] to [illegible]

[illegible] against him. [illegible]

[illegible], Ch. 140, [illegible]

[illegible] his [illegible]

[illegible] order to [illegible]

make pleadings and proof correspond, without the necessity of a separate count or plea as to each of such averments. 49 C.J. 97-98 contains reference to many states which by statute have sanctioned such form of pleading. As we understand the above section of the Practice Act, the defendant may plead to the paragraph of the complaint with equal certainty to that used by plaintiff.

We are of the opinion that paragraph 13 of the complaint meets with the intentions of the present Practice Act. The judgment of the court is therefore reversed and this cause is remanded with directions that the trial court shall enter its order denying the motion of defendant to make the complaint more specific as to said paragraph 13.

Reversed and remanded with directions.

ake pleadings and proof correspond, [illegible]

ate count or the [illegible] of such [illegible]

ontains reference to many states which by statutes have substituted

ion form of pleading. As we understand the [illegible] section of the

ractice act, the defendant may plead to the [illegible] complaint with equal certainty to [illegible] count.

We are of the opinion that [illegible]

ete with the intentions of the [illegible] act. The judgment

f the court is therefore reversed and the [illegible] with

irections that the trial court sustain the [illegible] motion of defendant to make the complaint [illegible]

ragraph 12.

Reversed and remanded, with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 597[3]

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 8944. AGENDA NO. 2.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1935.

Joseph Ingrassia and Nunzio Ingrassia,
Appellants,

vs.

Daisy K. Magoon and Ezra P. Magoon,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF WINNEBAGO COUNTY.

DOVE, J.

On November 21, 1931 Joseph Ingrassia and Nunzio Ingrassia filed their Bill of complaint in the Circuit Court of Winnebago County praying for the specific performance of a contract dated December 1, 1926. The complaint alleged that the defendants, in consideration of the payment of $42,500.00, agreed to convey to the plaintiffs by warranty deed, clear of all incumbrances, certain premises in the City of Rockford therein described. The bill also prayed that if the defendants shall fail to convey said premises according to the contract, that then they be required to pay to complainants all damages by reason of such failure. The bill also prayed for an injunction restraining appellees from further prosecuting a suit in forcible entry and detainer then pending in a justice court in the City of Rockford. A copy of the contract was attached to and made a part of the bill, and by its provisions the plaintiffs agreed to buy and the defendants agreed to sell said premises upon the following terms: $5,000.00 was paid in cash, $1500.00 was to be paid in ninety days, $1500.00 in one hundred eighty days and the balance of $34,500.00 was to be paid

CIV. NO. 8944.

IN [illegible]

[illegible]

[illegible], J. [illegible].

Joseph Ingrassia and Nunzio
Ingrassia,
Appellants,

vs.

Daisy K. Magoon and [illegible]
Magoon,
Appellees.

DOYLE, J.

On November 21, 1927 [illegible] filed their Bill of complaint in [illegible] County praying for the specific [illegible] December 1, 1926. The complaint [illegible] consideration of the demurrer of [illegible] the plaintiffs by [illegible] certain premises in the City of [illegible] bill also prayed that in the [illegible] premises according to the [illegible] to complainants [illegible] also prayed for an injunction [illegible] prosecuting [illegible] in a justice court in [illegible] was attached to and made [illegible] the plaintiffs agreed to buy [illegible] said premises upon the following [illegible] cash, $1500.00 was to be paid in [illegible] hundred eighty days [illegible]

at the rate of $300.00 or more per month, commencing with the 1st day of January, 1927. That when the said amount was paid down to $25,000.00 the defendants agreed to convey said premises to the plaintiffs by a warranty deed, free and clear of all encumbrances, at which time the plaintiffs were to execute a note and trust deed on said premises for that amount, payable in five years, said trust deed to be a first and valid lien on said premises. It was further agreed that the special assessment then levied against said premises for the improvement of the alley and any and all other special assessments and taxes were to be paid by the plaintiffs who also were obligated to carry at their own expense at all times at least $25,000.00 of fire, windstorm and tornado insurance in a reputable insurance company or companies satisfactory to the defendants. Said policy or policies to be payable to Daisy K. Magoon and to contain riders whereby the rights and interests of the vendees should be recognized and protected. The contract further provided that at the time of the delivery of the deed, the defendants would furnish an abstract of title showing merchantable title to the premises in Daisy K. Magoon.

m The bill of complaint further alleged that on September 26th, 1931, the defendants served a written notice on the plaintiffs to the effect that there was due the defendants under the terms of said contract on the 15th day of September, 1931 the sum of $1,970.24 and that the insurance policies on the premises were unsatisfactory and that if said sum was not paid and new insurance made satisfactory within thirty days, that the plaintiffs' rights under said contract would be forfeited. That within said thirty days, said plaintiffs offered to pay said sum of money and comply with the terms of said agreement but the defendants declined to accept said offer and on October 29, 1931, b egan suit in forcible entry and detainer against the plaintiffs, falsely pretending that the plaintiffs were in default. It was then alleged that on the

at the rate of $300.00 or [illegible]

day of January, 1927. The [illegible]

$25,000.00 the defendants agreed to convey [illegible]

plaintiffs by a warranty deed, free and clear [illegible]

at which time the plaintiffs were to [illegible]

on said premises for that amount, payable [illegible]

deed to be a first and valid lien on said [illegible]

agreed that the special assessment [illegible]

premises for the improvement of [illegible]

special assessments and taxes were to be [illegible]

who also were obligated to convey [illegible]

times at least $25,000.00 [illegible] indebtedness [illegible]

insurance in a reputable insurance company [illegible]

to the defendants. Said policy or policies [illegible]

K. Magoon and to contain riders thereby [illegible]

of the vendees should be recommenced and [illegible]

further provided that at the time of the delivery of the

deed, the defendants could furnish an abstract of title showing

merchantable title to the premises in Tulsa [illegible]

m The bill of complaint further alleged [illegible]

1931, the defendants served a written notice [illegible]

the effect that there remains the defendants [illegible]

said contract on the 15th day of September, [illegible]

$1,970.24 and that the insurance policies [illegible]

unsatisfactory and that if said are not [illegible]

made satisfactory within thirty days, that [illegible]

under said contract would be forfeited. [illegible]

said plaintiffs offered to pay said [illegible]

the terms of said agreement but [illegible]

said offer and on October 5, 1932, [illegible]

and detainer against the plaintiffs, [illegible]

plaintiffs were in default. [illegible]

following day Anthony Ingrassia, a brother of the plaintiffs who was an attorney, paid the defendants the sum of $2,147.83, which included interest upon said sum of $1,970.24, together with $54.55 expense incurred by defendants in bringing said forcible entry and detainer suit and that shortly after the receipt of said sum of money, Ezra P. Magoon, one of the defendants, informed the plaintiffs that there had been a mistake in computing the balance due the defendants and that to reduce the balance due the defendants to $25,000.00 the correct amount was $18.01 more than the plaintiffs had paid. It was further alleged that on November 5, 1931, the plaintiffs tendered that amount, together with a note for $25,000.00 and a trust deed to secure the payment of the same, as provided in the contract, and demanded from the defendants a warranty deed to the premises described in the contract, said warranty deed to be delivered by the defendants to the plaintiffs within three days but that the defendants have wholly failed to make, execute and deliver to the plaintiffs said deed, although the plaintiffs have been at all times ready, willing and able to comply with all the terms of said contract on their part to be performed, but the defendants refuse to execute a deed and convey the premises as they obligated themselves to do and have refused to dismiss the forcible entry and detainer suit, contrary to their agreement.

A preliminary injunction was issued as prayed, and thereafter on August 12, 1932 an amended answer was filed by the defendants, which admitted the execution of the contract of sale as set forth in the bill of complaint and the institution of the forcible entry and detainer suit to recover possession of the premises involved. It was averred in the amended answer that there had been default in the monthly payments under the contract so that there was due at the time the forcible entry and detainer suit was instituted approximately $2,000.00. The amended answer denied that the complainants had paid the taxes and assessments as provided in the contract and denied that they had maintained policies of

following day [illegible]
was an attorney, [illegible]
included interest [illegible]
expenses incurred by defendants in bringing [illegible]
and defendant [illegible] truly [illegible]
of money, [illegible]
plaintiffs that [illegible]
due the defendants and [illegible]
to $25,000.00 [illegible]
had paid. It was further [illegible]
plaintiffs tendered [illegible]
and a trust deed to secure [illegible]
in the contract, [illegible]
to the premises [illegible]
be delivered by [illegible]
but that the defendants [illegible]
deliver to the plaintiffs [illegible]
been at all times ready, [illegible]
terms of said contract on their part [illegible]
defendants refused to accept [illegible]
they obligated themselves [illegible]
forcible entry and detainer [illegible]

A preliminary injunction [illegible]
on August 12, 1928 [illegible]
which admitted the [illegible]
in the bill of complaint [illegible]
entry and detainer suit [illegible]
involved. It was averred in [illegible]
been default in the [illegible]
there was due at the [illegible]
was instituted [illegible]
that the complainants had [illegible]
ed in the contract and [illegible]

insurance in reputable insurance companies as provided in said agreement and denied that within thirty days after September 26, 1931 the complainants had paid the amount mentioned in their bill of complaint or that they had offered to pay the balance remaining unpaid and denied that the complainants were ready, willing and able to comply with the terms of said agreement and denied that either of the defendants had ever informed the complainants that said sum of $2,147.83 mentioned in the bill was accepted by them as the total amount due. By their amended answer the defendants neither admitted nor denied the allegations of the bill to the effect that the complainants had tendered notes and a trust deed as provided by the contract, but averred that if said notes and trust deed were tendered, the trust deed was not a first and valid lien upon said premises. In the answer it was further averred that the insurance policies placed by the complainants upon the property were not satisfactory, as some of the policies were written by companies not members of the Board of National Fire Underwriters and that there was one policy for $20,000.00 written in a mutual company, the solvency of which was unknown to the defendants, and that the defendants requested of the complainants that not more than $5,000.00 insurance be placed in any one company. It was further alleged that in January, 1931 the complainants handed a policy to the defendants, whereupon the defendants investigated the company that had written said policy and returned the same to the complainants, stating that the policy was unsatisfactory. That before that time the policy of insurance which the complainants had procured had been cancelled because the complainants had neglected and failed to pay the premiums thereon, and because of these facts the defendants insisted that the premiums be paid and evidence of such payments furnished to the defendants but the complainants refused and neglected to do so. It was further alleged that at one time a policy was cancelled and that the premises were without insurance for several

insurance in reputable insurance co[illegible]
agreement and denied that within [illegible]
1931 the complainants had [illegible]
of complaint or that they had [illegible]
unpaid and denied that the complainants [illegible]
to comply with the terms [illegible]
of the defendants had ever informed [illegible]
of $2,147.83 mentioned in [illegible]
total amount due. By their [illegible]
admitted nor denied the allegation [illegible]
the complainants had [illegible]
by the contract, but avers that [illegible]
were tendered, the trunk dead was not [illegible]
said premises. In the [illegible]
insurance policies [illegible]
were not satisfactory, as [illegible]
companies not members of the Board of [illegible]
and that there was one [illegible] $20,000.00 written [illegible]
company, the solvency of which was unknown to the defendants, and
that the defendants [illegible]
than $5,000.00 insurance [illegible]
alleged that in January, 1933 the [illegible]
the defendants, whereupon the [illegible]
that had written said policy [illegible]
ants, stating that the policy [illegible]
time the policy of insurance [illegible]
been cancelled because the [illegible]
to pay the premiums thereon, [illegible]
stated that the premiums [illegible]
furnished to the defendants but [illegible]
to do so. It was further alleged [illegible]
cancelled and that the premiums [illegible]

days and that after the beginning of the forcible entry and detainer suit, the complainants sent, by mail, to the defendants a policy which before that time the defendants had rejected. It was further alleged that prior to November 29, 1931, the defendants, being dissatisfied with the insurance as placed upon said property by the complainants, caused policies to be written in companies satisfactory to them, at an expense of $134.00, which the complainants have neglected and refused to pay. Upon the issues so made by the original bill and amended answer, a hearing was had before the Chancellor on March 29th, 30th and 31st, 1933 and at the conclusion of the evidence, the cause was taken under advisement. Evidently in July, 1933, the court made a ruling of some kind in connection with this case, but just what it was is not disclosed by the record, but on July 7, 1933, leave was granted the defendants to file a cross bill instanter and an order was entered to the effect that the original bill should stand as an answer to said cross-bill and further evidence was heard by the Chancellor on September 14, 1933. On October 31, 1933, an order signed by the Chancellor was entered, which recited that the Chancellor gave a ruling in this case in July, 1933 which the Chancellor thought was in writing and had been delivered to the parties or to the clerk. This order then stated that the court was not going to vacate, change or contradict that ruling. The order then recited that the matter came on to be heard by the court on October 31, 1933 upon the motion of the defendants to appoint a receiver, and upon a cross motion of the original complainants for a finding that the defendants had failed to deliver a deed to the property free and clear of any encumbrance and that the cause be referred to the Master to state an account. The court denied the cross motion, but directed that within the next ten days the parties get together and carry out all of the terms of the contract, that the general taxes due against the property and the special assessments and back interest to the amount of $1800.00

days and that after the beginning of [illegible] and [illegible]
suit, the complainants sent, by mail, to the defendants a [illegible]
which before that time the defendants had received. [illegible]
alleged that prior to November 25, 1923, the [illegible]
dissatisfied with the insurance as placed upon said property by the
complainants, caused policies to be written in a [illegible] satisfactory
to them, at an expense of $134.00, which the complainants have
neglected and refused to pay. Upon the issues as made by the
original bill and amended answer, a hearing was had before the
Chancellor on March 29th, 30th and 31st, [illegible] the consideration
of the evidence, the cause was taken under advisement. [illegible] identity
on July, 1923, the court made a ruling [illegible] correction
with this case, but just what it was is not stated in the record,
but on July 7, 1923, leave was granted the defendants to file a
cross bill instanter and an order was entered to the effect that
the original bill should stand as an answer to said cross-bill and
further evidence was heard by the Chancellor on September 14, 1923.
On October 31, 1923, an order signed by the Chancellor was entered,
which recited that the Chancellor gave a ruling in [illegible]
July, 1923 which the Chancellor thought was in writing and had been
delivered to the parties or to the clerk. This [illegible] then stated
that the court was not going to vacate, change or [illegible] that
ruling. The order then recited that the matter came on to be heard
by the court on October 31, 1923 upon the motion of the defendants
to appoint a receiver, and upon a cross motion [illegible]
complainants for a finding that the defendants had [illegible]
deed to the property free and clear of any encumbrance [illegible]
cause be referred to the master to state an account. The court
denied the cross motion, but directed that [illegible]
says the parties get together and carry out the terms of
the contract, that the general [illegible] property and
the special assessments [illegible] interest to the amount of $1800.00

should be paid by the original complainants and that they should execute the note and trust deed as provided by the contract and that the defendants should execute a proper deed of conveyance and cause the mortgage upon the premises to be released and that the several instruments be made, executed delivered and passed from one party to the other and with the clerk of the Circuit Court of Winnebage County within ten days from this date. It was further decreed that if said order was not carried out within ten days that then the court would appoint a receiver for the property and proceed to wind up the differences between the parties to the litigation.

The record further discloses that on November 10, 1933, the original complainants filed in the trial court two motions, one to dismiss their suit and the other to strike from the files the cross bill of the defendants.

On November 22, 1933 the court entered a further order finding that the order of October 31, 1933 was not complied with by the original complainants and the court appointed John Fishdick receiver of the property involved herein. The following day the receiver qualified. On December 15, 1933 Fishdick resigned as receiver and Ezra P. Magoon was appointed his successor. Nothing further seems to have been done until September 14, 1934 when the court heard evidence in support of and in opposition to the motion of the original complainants to strike from the files the cross bill of the defendants. On December 30, 1934 a decree was entered which found that on December 1, 1926 the parties to this litigation entered into the contract set forth in the original bill of complaint. That on September 15, 1931 the defendants claimed the plaintiffs were in default in making the payments provided by the contract in the sum of $1970.24 and also that the plaintiffs were in default in not furnishing to the defendants insurance policies as provided in the contract. That on September 26, 1931, the defendants gave to the plaintiffs written notice of said defaults and thereafter began suit

hould be paid by the original complainants on that day, and
xecute the note and trust deed as provided by the contract and
hat the defendants should execute a proper deed of conveyance and
ause the mortgage upon the premises to be released [illegible] the
everal instruments be made, executed delivered and passed from
he party to the other and with the clerk of the circuit court of
innebago County within ten days from this date. It was further decreed
hat if said order was not carried out within ten days [illegible]
ourt would appoint a receiver for the property and proceed to wind
p the differences between the parties to the litigation.

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hat the order of October 21, 1933 was not complied with by the
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eceiver of the property involved herein. The following day the
eceiver qualified. On December 15, 1933 Rudick resigned as
eceiver and Vera F. Bacon was appointed his successor. Nothing
urther seems to have been done until September 14, 1934 when the
ourt heard evidence in support of and in opposition to the motion
f the original complainants to strike from the files the cross bill
f the defendants. On December 20, 1934 a decree was entered which
ound that on December 1, 1934 the parties to this litigation entered
nto the contract set forth in the original bill of complaint. That on
eptember 15, 1931 the defendants claim a the plaintiffs were in
efault in making the payments provided by the contract [illegible] and
f $1970.24 and also that the plaintiffs were in default in not
urnishing to the defendants insurance policies as provided in the
ontract. That on September 26, 1931, the defendants gave to the
laintiffs written notice of said default and thereafter began suit

in forcible entry and detainer to recover possession of the property described in the contract. That thereafter the plaintiffs tendered to the defendants $2,147.83, which included certain expenses of defendants, and the defendants received the same with the understanding that the amount of the principal and interest due on said contract should be refigured and that if there was any error therein, either party would correct the same. That there was an error in figuring the interest as there was in fact due the defendants $2,220.39, instead of $2,147.83, said error amounting to the sum of $72.56. That on November 1, 1931, the plaintiffs had not procured insurance in accordance with the terms of the contract and the defendants were compelled to and did procure said insurance. That at the time of the institution of this suit (November 21, 1931), it was the duty of the plaintiffs to pay said sum of $72.56 and also to pay certain special assessments on said property in the sum of $282.03, and also to execute and deliver a note or notes aggregating $25,000.00 and to secure the same by a mortgage or deed of trust, which would be a first lien on the premises described in the contract. That the execution and delivery of said notes and trust deeds were to be concurrent with the execution by the defendants to the plaintiffs of a deed to the premises in said contract described. That the plaintiffs did not pay the taxes for the years 1931 and 1932 as they were required to do by the contract and that the taxes, including interest and costs for the year 1931, amounted to the sum of $572.86 and that at the time the decree was rendered amounted, with interest and penalty, to $744.78. That the taxes for the year 1932, with cost and interest amounted to $482.97 and that with interest and the penalty amounted, at the time the decree was entered, to $550.54. That the 1933 taxes had not been paid by the plaintiffs and that with cost and interest they amounted to $374.60. That the premises were encumbered to secure the payment of $20,000.00 with interest, which is past due, but which the defendants have at all times been ready, willing and able to renew or caused to be released if the plaintiffs had complied with their part of the contract. That before the institution of this

forcible entry and detainer to recover [illegible]
scribed in the contract. That thereafter [illegible]
the defendants $2,147.85, that [illegible]
ndants, and the [illegible]
t the amount of the [illegible]
ould be refigured [illegible] it there was [illegible]
uld correct the same. [illegible]
erest as there [illegible]
$2,147.85, said error [illegible]
ember 1, 1931, the [illegible]
ordance with the terms of the contract [illegible]
pelled to and did [illegible]
stitution of this suit (November 21, 1931), [illegible]
inities to pay said sum of $7[illegible] and [illegible]
easements on said property [illegible]
deliver a note or notes [illegible]
e by a mortgage or deed of trust, which [illegible]
premises described [illegible]
livery of said notes [illegible]
ution by the defendants [illegible]
mises in said contract [illegible]
the taxes for the [illegible]
by the contract and [illegible]
the year 1931, amounted [illegible]
e the decree was rendered [illegible]
$744.78. That the [illegible]
unted to $482.97 and [illegible]
the time of the [illegible]
not been paid by [illegible]
y amounted to $274.[illegible]
payment of $30,000.00 with interest, [illegible]
defendants have [illegible]
ve or caused to be [illegible]

suit, the plaintiffs did not pay said sum of $72.56, did not pay the special taxes which were then a lien on said property in the sum of $282.03, and did not execute or offer to deliver a note or notes aggregating $25,000.00 and did not execute or offer to execute a trust deed on said property to secure the payments of said notes and did not procure insurance on said premises in accordance with the terms of said contract. That during the progress of the trial of this proceeding, the plaintiffs claimed that they would carry out the terms of the contract and that it was on account of said claim of the plaintiffs and for the purpose of partially determining said cause that the court entered the order herein referred to on October 31, 1933. That after the entry of the order on October 31, 1933, the defendants were at all times during the ten day period therein provided ready, willing and able to fully and completely perform said order on their part, but that the plaintiffs, at the time of the institution of this suit, had not performed their part of said contract, and were therefore not entitled to specific performance.

The decree further found that the defendants filed herein a cross bill by leave of court, and that by and with the consent of the plaintiffs, it had been ordered by the court that said original bill should stand as the answer to said cross-bill. That said cross bill prayed the court to find that on September 26, 1931, the plaintiffs were in default in the performance of the terms of said contract and were so in default on October 29, 1931 and have continued to be in default to the present time, and to find that the plaintiffs have failed to pay special assessments which were a lien on said premises and have failed to pay interest on the principal sum remaining unpaid and have failed to pay certain installments upon the principal sum. The decree also found that said cross bill also prayed for a decree finding that the defendants were entitled to possession of the premises, and that the court should ascertain the amount of principal and interest due the defendants and should order the plaintiffs to pay the same and provide that upon a failure so to pay such amount that the

[illegible]

plaintiffs be decreed to have no further interest in the premises.

The decree then found that the defendants were entitled to the relief so prayed for in their cross-bill and found that at the time the decree was entered there was due the defendants from the plaintiffs the sum of $25,000.00 principal and $4,579.45 interest thereon, together with the sum of $282.03 special assessments, together with $45.72 interest thereon, also the sum of $1295.32 taxes for the years 1931 and 1932, also the sum of $72.56, the error above referred to, together with interest thereon at six per cent, amounting to $13.28, and also for taxes for the year 1933 amounting to $374.60, that the total of said sums aggregate $31, 662.96, which amount the court ordered the plaintiffs to pay the defendants, together with 5% interest from the date of the decree. The decree then provided that the plaintiffs may, at their option, satisfy said decree and pay said sum in accordance with one of the following methods: First, that within ninety days from the date of the decree the plaintiffs may redeem said property by the payment of $31,662.96, together with interest thereon at the rate of five per cent until paid. That upon the payment of said sum the defendants are directed to convey to the plaintiffs by warranty deed said property, free and clear of all encumbrances. Second: That the plaintiffs may execute and deliver to the defendants promissory note or notes signed by themselves and their wives for the sum of $25,000.00 payable in five years from date, with interest at six per cent, payable semi-annually, said notes to be in such denominations as the defendants may elect and to execute and deliver to the defendants a trust deed to such trustee as the defendants may elect, said trust deed to be in the usual form used in Winnebago County, Illinois, signed by the plaintiffs and their wives, which said trust deed shall be a first lien upon said property so far as any act or omission of the plaintiffs is concerned, and that at the same time the plaintiffs shall pay to the defendants the sum of $6,662.96 in cash and upon the execution and delivery of said instruments and the payment of said sums, the defendants were directed to execute and

aintiffs be decreed to have a [illegible]

The decree then found that [illegible]

ilar so prayed for in their cross-bill in [illegible] that [illegible]

e decree was entered there [illegible] the defendants [illegible]

e sum of $25,000.00 principal and $4,579.[illegible] interest thereon,

ogether with the sum of $585.[illegible] special [illegible]

5.72 interest thereon, also the sum of [illegible]

ars 1931 and 1932, also the sum of [illegible] interest

, together with interest thereon at [illegible]

d also for taxes for the year 1932 amounting [illegible]

tal of said sums aggregate $[illegible], 885.56, with [illegible]

dered the plaintiffs to pay the defendants, [illegible] interest

om the date of the decree. The decree [illegible]

aintiffs may, at their option, satisfy [illegible]

n in accordance with one of the following [illegible] that

thin ninety days from the date of the decree the plaintiffs may

deem said property by the payment of $81,885.56, together with

terest thereon at the rate of five per cent [illegible] that upon

e payment of said sum the defendants are [illegible] to the

aintiffs by warranty deed said property, free [illegible]

cumbrances. Second: That the plaintiffs [illegible] deliver [illegible]

e defendants promissory notes [illegible]

eir wives for the sum of $[illegible].00 payable [illegible]

th interest at six per cent, [illegible]

such denominations as the defendants may [illegible]

liver to the defendants [illegible]

y elect, said trust deed to be in the usual form [illegible]

unty, Illinois, signed by the plaintiffs [illegible]

ust deed shall be a first [illegible]

omission of the plaintiffs is concerned, [illegible]

e plaintiffs shall pay to the defendants [illegible]

ab and upon the execution and delivery of said [illegible]

yment of said sums, the defendants were [illegible]

deliver to the plaintiffs a warranty deed for said premises, free and clear of all encumbrances except said trust deed for $25,000.00. Third: The plaintiffs may assume the encumbrance of $20,000.00 now on said premises, pay all taxes and special assessments up to ~~the~~ date and to pay to the defendants the sum of $4,665.29, which is the interest now due on the $25,000.00 aforementioned in said decree, together with the sum of $72.56 and interest as before mentioned and five per cent from the date of the decree until said sum is paid. It was further ordered that in the event the plaintiffs pay as provided in this paragraph of the decree, that the defendants shall deliver to the plaintiffs a warranty deed for said premises, subject to the encumbrance of $20,000.00 now on said premises, and subject also to the taxes and special assessments remaining unpaid.

The decree further provided that in the event the plaintiffs failed to satisfy, as aforesaid, said sum of $31, 662.96, within ninety days from the date of the decree, that then the premises be sold at public auction upon the same notice as required by law for sale of real estate under the execution. The decree then appointed a special master to execute the decree and directed that the costs be taxed against the plaintiffs and ordered that the defendants be let into possession of the premises. It is from this decree that the plaintiffs in the original bill prosecute this appeal.

The original bill alleged that on October 30, 1931, the day after the forcible entry and detainer suit was instituted by appellees, that appellants paid and appellees accepted $2147.83 and that on November 5, 1931 appellants tendered to appellees the further sum of $18.01 (the amount which it was alleged appellees insisted was necessary to reduce the balance due them to $25,000.00), together with a note for $25,000.00 and trust deed to secure the payment of the same and demanded from appellees the deed as provided by the contract. The original bill further alleged that appellants had been at all times ready, willing and able to comply with all the terms of the contract upon their part to be performed. The answer put these averments in issue and denied

liver to the plaintiffs [illegible]

ar of all encumbrances [illegible]

e plaintiffs may assume [illegible]

emises, pay all taxes [illegible]

pay to the defendants the sum [illegible]

due on the $25,000.00 [illegible]

sum of $72.86 and interest [illegible]

on the date of the deed [illegible]

lared that in the court [illegible]

graph of the deed, [illegible]

ntiffs a warranty [illegible]

$20,000.00 now on sale [illegible]

tal assessments [illegible]

The deed further [illegible]

led to satisfy, as [illegible]

ty days from the date [illegible]

d at public auction [illegible]

e of real estate under [illegible]

pecial master to execute [illegible]

ed against the plaintiffs [illegible]

o possession of the premises. It is [illegible]

ntiffs in the original [illegible]

The original bill [illegible]

forcible entry [illegible]

llants paid and [illegible]

1931 appellants [illegible]

unt which it was alleged [illegible]

balance due them [illegible]

trust deed to secure [illegible]

llegen the deed as provided [illegible]

ther alleged that [illegible]

able to comply with [illegible]

be performed. The answer put [illegible]

that appellants had ~~complied~~ complied with all the terms of the contract to be performed by them, denied that appellants had paid the taxes and assessments mentioned in the contract and denied that they had maintained at their own expense in reputable insurance companies satisfactory to appellees insurance, as they were required to do by the contract. The evidence is that on October 30, 1931 the parties met and there was some discussion with reference to making a new contract and one was prepared but never executed. On the same day appellants paid appellees $2147.83, which was accepted by them not in full of the amount due them under the contract, but subject to correction if the amount of interest was not correctly computed.

The evidence further disclosed that on October 2, 1931, the attorney then representing appellants, who was a brother of Joseph Ingrassia, requested that appellees furnish an abstract of title showing merchantable title in Daisy K. Magoon. This was done and on October 20, 1931, the attorney for appellants wrote his clients that at their request he had examined the abstract of title to the premises involved, the last certificate thereon being dated October 14, 1931 at 9 o'clock A. M., and that it was his opinion that the title to said premises is in Daisy K. Magoon in fee simple, subject to special assessments for paving south Main Street in cause No. 134 under an order entered April 15, 1926, subject also to the taxes for the current year and subject also to a trust deed encumbrance of $20,000.00. The evidence further discloses that at this time there were five installments of street paving amounting to $60.90 each, which were unpaid, and which under the contract were to be paid by appellants.

The decree which we are called upon to review found that during the progress of the trial that appellants claimed that they would carry out the terms of the contract and it was on that account that the order of October 31, 1933, was entered. The evidence sustains

t appellants had [illegible] complied wi[illegible]
be performed by them, [illegible]
eements mentioned in the contract and [illegible]
their own expense in [illegible]
allees insurance, as they were required [illegible]
dence is that on October 30, [illegible] the [illegible]
ussion with reference to [illegible] a new form [illegible]
never executed. On the same day appell[illegible]
h was accepted by them not in [illegible] of the [illegible]
contract, but subject to [illegible] ation in [illegible]
correctly computed.

The evidence further [illegible] that on [illegible], the
orney then representing [illegible], who were [illegible] through
rasia, requested that [illegible] Turkish [illegible] title
ving merchantable title in [illegible] Oregon. [illegible] and on
ober 20, 1931, the attorney for appellants wrote [illegible] appellants that
their request be had examined the abstract of [illegible] title [illegible]
ived, the last certificate thereon being dated [illegible], 1931
9 o'clock A. M., and that it was his opinion [illegible]
nlees is in Delay K. [illegible] on in fee simple, [illegible]
essments for paving [illegible] street in [illegible]
r entered April 15, 1930, subject also to [illegible]
and subject also to a trust deed amounting [illegible]
hence further disclosed that a [illegible] time [illegible]
street paving amounting to $[illegible], which [illegible]
r the contract were to be paid by appellants.

The decree which we are called upon to review [illegible]
progress of the trial [illegible] difficult [illegible]
y out the terms of the contract and [illegible]
order of October 30, 1932, was [illegible]

this finding. The order granted appellants the relief they sought by their original bill. The final decree also found that appellees, after the entry of the order of October 31, 1933, were at all times ready/willing and able to fully and completely perform said order on their part, but that appellants were not and that therefore they were not entitled to specific performance. The evidence in the record in our opinion also sustains this finding. On November 10, 1933 appellants filed their motion to strike appellees' cross-bill from the files on the ground that no copy of the cross-bill was served on counsel for appellants as provided by Rule 24 of the Circuit Court of Winnebago County. They also filed their motion to dismiss the original bill. These motions were filed in the late afternoon of the final day mentioned in the order of October 31, 1933. The motion to dismiss came too late. The order of October 31, 1933 had been entered ten days before and appellees had a cross-bill on file.

The record discloses that on July 7, 1933 leave was granted appellees to file their cross-bill instanter and at the same time an order was entered that the original bill should stand as an answer to this cross-bill. As a matter of fact the cross-bill bears the file marks of the clerk as having been filed October 31, 1933. Counsel for appellants call our attention to Rule 24 of the Circuit Court of Winnebago County, which requires that copies of all pleadings, filed subsequent to the morning of default day, shall be served upon opposing counsel on the same day on which the same are filed and insist that while they were served with a copy of a cross-bill on July 7, 1933, the day the order was entered, still the cross-bill which was filed on October 31, 1933, contained paragraphs numbered twelve and thirteen which were not in the copy of the cross-bill which they received on July 7, 1933, and therefore the cross-bill had no place in the files.

The Chancellor heard the evidence in support of appellant's motion of November 10, 1933 to strike the cross-bill from the files. Mr. Harry B. North, counsel for appellants, testified that when the parties were in court on July 7, 1933, Mr. Hall (counsel for

ble finding. The trial court [illegible]

by their original bill. The [illegible] dere[illegible]

after the entry of the order of October [illegible]

willing

ready and able to [illegible]

part, but that [illegible]

entitled to specific performance. The [illegible]

opinion also sustains this [illegible]

filed their motion [illegible]

the ground that [illegible]

appellants as [illegible]

ounty. They also [illegible]

These motions were [illegible] to [illegible]

entioned in the order of [illegible] October 22, 1917.

ame too late. The order [illegible] October 22, [illegible]

ays before and appellees [illegible] cross-bill [illegible]

The record discloses [illegible] on July 7, [illegible]

ppellees to file their [illegible] cross-bill instead [illegible]

rder was entered that [illegible] original bill [illegible]

o this cross-bill. [illegible] of fact [illegible]

ile marks of the clerk [illegible] have been filed [illegible]

ounsel for appellants [illegible] attention to [illegible]

ourt of Winnebago County, [illegible] required [illegible]

nge, filed subsequent [illegible] of [illegible]

erved upon opposing [illegible] same [illegible]

iled and later [illegible] were [illegible]

ross-bill on July 7, 1920, [illegible] the [illegible]

he cross-bill which [illegible] bar [illegible]

aragraphs numbered [illegible]

f the cross-bill which [illegible]

he cross-bill had [illegible]

The Chancellor heard [illegible]

otion of November 17, 1920 to strike [illegible]

r. Harry S. Leith, counsel for [illegible]

appellees) handed him or sent to him a copy of the cross-bill. That when he prepared and filed his motion to dismiss complainants' bill he knew the cross-bill was on file. Mr. Hall testified that on October 31, 1933 he and Mr. North were present in court and that Judge Shurtleff was on the bench and there was some discussion about the appointment of a receiver and at that time Mr. Hall produced the original and a copy of the cross-bill that day filed and stated to Mr. North: "I am going to file xxx a cross-bill, it is different from the one I have served on you. I have the original and a copy here." Mr. Hall further testified that he thereupon handed to Mr. North a copy of the cross-bill which he (Mr. Hall) afterward, but on the same day, filed with the clerk, that Mr. North took it, put his glasses on and stood on the left-hand side of the bench and turned through it a number of times and kept it and when the court entered the order hereinbefore set forth and Mr. Hall got ready to go he, Mr. Hall, said: "Mr. North, I want that copy of the cross-bill", and Mr. North replied that he also wanted a copy and Mr. Hall then said: "Let me have it and I'll have it filed", thereupon Mr. North handed it to Mr. Hall and it was immediately filed in the Clerk's office. Mr. North's version of what took place is to the effect that instead of putting his glasses on, he put his ear phone in his ear because he couldn't hear what was being said, that he didn't recall just what was said, but he thought Mr. Hall said he intended to file a cross bill which he understood was the cross-bill referred to in the order of July 7, 1933 and that he did not read or have in his hands the copy of the cross-bill which was filed October 31, 1933. He further testified that he did not know just when he did receive a copy of the cross-bill filed October 31, 1933. As heretofore stated, the only difference in the cross-bill, a copy of which Mr. North says he did receive a copy of on or about July, 1933, and the one that was filed October 31, 1933 was that the cross-bill filed October 31, 1933 contained paragraphs twelve and thirteen. Paragraph twelve alleged that the premises involved in this proceeding were

[illegible] (appellees) handed him or sent to him a copy [illegible]

[illegible] when he prepared and filed [illegible] on behalf [illegible]

[illegible] he knew the cross-bill was on file. Mr. [illegible]

[illegible] October 31, 1933 he and [illegible] were [illegible]

[illegible] Judge Shurtleff was on [illegible] there [illegible] on [illegible]

[illegible] the appointment of receiver [illegible] that [illegible] presented the

[illegible] original and a copy of the cross-bill [illegible] handed to

[illegible] Mr. North: "I am going to [illegible] a copy [illegible] different

[illegible] from the one I have served [illegible]. I have [illegible] copy

[illegible] here." Mr. Hall further [illegible] to Mr.

[illegible] North a copy of the cross-bill which he [illegible], but

[illegible] the same day, filed with [illegible], that Mr. [illegible], but his

[illegible] lessees on and stood on the left-hand side of [illegible] turned

[illegible] through it a number of times and took it [illegible] entered

[illegible] the order heretofore set forth [illegible] Mr. [illegible] to be,

[illegible] Mr. Hall, said: "Mr. North, I want that copy [illegible] cross-bill",

[illegible] and Mr. North replied that he also wanted a copy [illegible]. Hall then

[illegible] said: "Let me have it and I'll have it filed", [illegible] Mr. North

[illegible] handed it to Mr. Hall and it was immediately [illegible] North's

[illegible] office. Mr. North's version of what took place in [illegible] office

[illegible] that instead of putting his lessees on, he put [illegible] in

[illegible] car because he couldn't hear what was [illegible] didn't

[illegible] recall just what was said, but he thought [illegible]

[illegible] file a cross bill which he [illegible] a [illegible] reference

[illegible] in the order of July", [illegible] that he [illegible]

[illegible] his hands the copy of [illegible] cross-bill [illegible]

[illegible] further testified that he did not know [illegible]

[illegible] copy of the cross-bill filed [illegible]

[illegible] the only difference in the [illegible]

[illegible] he did receive a copy [illegible]

[illegible] was filed October 31, [illegible]

[illegible], 1933 contained [illegible] the [illegible]

improved by buildings and rented and gave the names of the tenants and averred that the cross-defendants had collected the rents and asked for the appointment of a receiver. Paragraph thirteen alleged that the cross-complainants had arranged to fully comply with the contract mentioned in the original bill and had so advised the cross-defendants and that the solicitor for the cross-defendants had advised them that the cross-defendants were not able to carry out said contract on their part. The record discloses that in open court when counsel for all parties were present, leave was granted appellees to file their cross-bill and an order was entered that the original bill should stand as an answer thereto. We do not think there is any merit in appellants' contention that the Chancellor erred in not striking this cross-bill from the files on the ground that no copy thereof was ever served on counsel for appellants, nor do we think that the court erred in refusing to permit appellants to dismiss their suit.

No good purpose could be served by reviewing at length the evidence found in this record. We have read all of it. It is not insisted that at the time the decree was rendered appellants were not indebted to appellees under the provisions of the contract in the amount found by the decree and by its provisions every right which appellants could assert or insist upon under the contract is very fully and carefully safeguarded. There is an error in that portion of the decree which authorized appellants to satisfy the amount found due, being $31,662.96 by assuming the payment of the $20,000.00 mortgage and paying $4,665.29, together with other enumerated items. It is obvious, as pointed out by counsel for appellees, that there is a mistake of $5,000.00 and that the amount stated as $4,665.29 should be $9,665.29. The decree will be modified in this particular and as so modified will be affirmed.

Decree Modified and Affirmed.

[illegible]

[illegible] but the oral [illegible]

the appointment [illegible] . [illegible] . [illegible]

cross-complainants [illegible] so [illegible]

[illegible] in the [illegible] and so [illegible]

that the solicitor [illegible]

cross-defendants [illegible]

. The record [illegible]

[illegible] were [illegible]

and an order [illegible]

answer thereto. [illegible]

[illegible]tion that the [illegible] in not [illegible]

the files on the [illegible] copy [illegible]

[illegible] for appellants, [illegible] in returning

[illegible]ermit appellants to [illegible] suit.

[illegible] good purpose could be served by reversing [illegible]

[illegible]ence found in this [illegible] . [illegible] have [illegible] . It is not

[illegible]ated that at the time [illegible] the [illegible] was [illegible]

indebted to appellees [illegible] the [illegible]

[illegible]t found by the [illegible] by the [illegible]

[illegible]llants could assert [illegible] upon [illegible]

[illegible] and carefully [illegible] . There is [illegible]

[illegible] decree which [illegible]

being $21,855.98 by [illegible]

[illegible] and paying $4,000. [illegible]

[illegible] conditions, as [illegible]

[illegible]tate of $5,000.00 [illegible]

$9,855.98. The [illegible]

[illegible] modified will be [illegible] .

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 597

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 8993. AGENDA NO. 38.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1935.

LAWRENCE H. WILLIAMS, Administrator of the Estate of Stanley Buches, Deceased,
Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF MCHENRY COUNTY.

DOVE, J.

This suit was instituted by the administrator of the estate of Stanley Buches to recover damages sustained by reason of his alleged wrongful death and to recover damages resulting from the destruction, at the same time, of his automobile. Upon the first trial, at the close of all the evidence, the jury returned a verdict in favor of the defendant in obedience to a peremptory instruction. Upon a review of that record this court reversed that judgment and remanded the cause. (Williams v. C. & N. W. Ry. Co., 274 Ill. App. 671, abst.) Upon the second trial, a verdict was returned in favor of the plaintiff and against the defendant for $10,000.00, upon which judgment was rendered and the record is again in this court for review.

GRN. NO. 8925.

IN [illegible]

[illegible]

LAWRENCE H. [illegible], Administrator
of the Estate of Stanley Bunker,
Deceased,

[illegible]

vs.

CONTINENTAL AIR [illegible]
COMPANY, a Corporation,

[illegible]

BOVE, J.

This suit was instituted by the [illegible] Stanley Bunker to recover [illegible] wrongful death and to recover damages [illegible] at the same time, of his authority. Upon [illegible] place of all the evidence, the jury [illegible] the defendant in obedience to a peremptory [illegible] of that record this court reversed the judgment [illegible] cause. (Williams v. [illegible]) [illegible] upon the second trial, a verdict was [illegible] tiff and against the defendant [illegible] rendered and the record is again [illegible].

The evidence discloses that the death of Buches occurred in the City of Harvard at the Division Street crossing where State Highway No. 23 intersects appellant's railroad tracks. At this point the railroad tracks of the appellant run in an easterly and westerly direction and consist of nine tracks, two main tracks, one east bound and one west bound, and seven side tracks. Three of these side tracks are north of the main tracks and four to the south. The highway runs north and south. The entire width of the crossing is 128 feet and from the south edge of the crossing to the center of the west bound track is 64 feet. The more northerly main track was the east bound track and the more southerly main track was the west bound track.

On the evening in question, October 24, 1929, appellee's intestate was driving his automobile north upon the highway and as he approached the crossing was obliged to stop, as the crossing was blocked by a freight train headed east on the east bound main track. There were no freight cars east of the highway on any of the tracks south of this east bound main track, nor were there any operations being conducted on any of these side tracks. While the crossing was so blocked, the crossing flagman was in the center of the highway south of the freight train and in obedience to his signal, the north bound traffic upon the highway stopped south of the south edge of the right of way, and south of the crossing. The crew of the freight train, in order to clear the crossing, divided the train and the engine and a number of freight cars passed to the east, thus opening the crossing for vehicular traffic. The evidence discloses

The evidence [illegible]

e City of Warren [illegible]

ighway No. 30 intersects [illegible]

oint the railroad [illegible]

asterly direction [illegible]

e east bound [illegible]

ree side tracks [illegible]

e highway runs [illegible]

128 feet and from the north [illegible]

e west bound track [illegible]

e east bound track [illegible]

ound track.

On the [illegible]

to was driving [illegible]

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ooked by a freight train [illegible]

ere were no freight cars [illegible]

uth of this east bound [illegible]

ing concealed [illegible]

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uth of the freight train [illegible]

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the right of [illegible]

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e engine and [illegible]

ening the crossing [illegible]

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that immediately in front of the Buches car was a passenger car and immediately in front of this passenger car was a truck. The truck and the passenger car in its rear passed safely over the crossing, but as these cars proceeded northward, a west bound passenger train approached the crossing from the ease travelling upon defendant's main northerly track, which is south of the track upon which the freight train had been standing, and struck the automobile driven by Buches, demolishing his car and killing him.

The evidence further discloses that the accident occurred between six and six-thirty o'clock in the evening, that the weather was clear but it was dark and the crossing flagman, was directing traffic with a red lantern and this flagman, when the train crew cut the freight train for the purpose of opening the crossing to traffic, looked to the east and west but did not see the west bound passenger train approaching and therefore he signalled with his red lantern to the automobiles on both sides of the crossing to proceed and they did so. There is evidence in the record that the truck and passenger car immediately behind it and the Buches car proceeded northward as one car, with only about four feet between the rear of each car and the front of the car immediately in its rear. The crossing flagman testified, however, that they were eight or ten feet apart. He further testified that none of the cars either from the north or south went over the crossing until he signalled for them to do so, and that after so signalling, he then walked to the south as far as the south rail of the most southerly track, looked east, then turned and walked west about sixteen feet until he had reached the outside of the crossing off the driveway. That a car came from the north and the truck and the other cars came from the south. That he then walked north along the westerly side of the crossing and observed the oncoming passenger train and that he then got on the crossing, blew

hat immediately in front [illegible]

mmediately in front [illegible]

nd the passenger car in [illegible]

ut as these cars crossed [illegible]

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ain northerly track, [illegible]

eight train had been [illegible]

y Buches, demolishing [illegible]

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etween six and six-[illegible]

as clear but it was [illegible]

raffic with a red lantern [illegible]

t the freight train [illegible]

raffic, looked to the [illegible]

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nd they did so. There is [illegible]

d passenger car immediately behind [illegible]

rthward on one car, with [illegible]

ion car and the front of the car [illegible]

ossing flagman testified, however, [illegible]

part. He further testified that [illegible]

e north or south west [illegible]

o do so, and [illegible]

far as the south [illegible]

tered and walked west along [illegible]

tside of the cross [illegible]

rth and the train and [illegible]

en walked north along the [illegible]

e oncoming passenger train [illegible]

his whistle and swung his lantern and tried to get in front of the Buches car but appellee's intestate dodged around him. There is evidence in the record to the effect that the flagman was standing upon the west side of the highway when he sought to stop the car being driven by appellee's intestate and that a car was passing over the crossing from the north and was directly in front, that is, to the east of the flagman, and that this car prevented the flagman from going to the center or east side of the highway where the deceased was travelling.

The evidence further disclosed that a car driven by John H. Hamilton was parked at a filling station, south of the Division Street crossing. Mr. Hamilton testified that he was there waiting for the freight train to clear the crossing so that he could proceed northward and when the freight train cleared the crossing, he started forward at the same time the other cars ahead of him did so and at the time of the collision he was, according to his estimate, about fifty feet south of the Buches car. This witness further testified that he did not see the flagman or see the collision but heard it and immediately stopped his car.

Edward J. Carroll testified he was employed at the time of the accident as brakeman on the head end of the freight train going east and that he pulled the pin which cut the train and that in his judgment the engine and fourteen cars passed to the east and the last car, when it stopped, was about thirty feet east of the crossing. That after it stopped he started to walk on the ground on the north side of the train and had proceeded about four car lengths east of the crossing when he saw the passenger train approaching. That he then turned around and went back west to the Division Street crossing and when he got there he began swinging his white lantern. That he did not see the truck go by, but did see a car ahead of the one that was struck.

his whistle and swung his lantern [illegible]
Dunham car but [illegible] to [illegible]
evidence in the record [illegible]
upon the rear [illegible]
being driven by [illegible]
over the crossing [illegible]
to the east of the [illegible]
from going to the [illegible]
the travel [illegible]

The evidence [illegible]
position was [illegible] station, [illegible]
reasing. Mr. [illegible]
reight train [illegible]
and when the train [illegible] crossing, [illegible]
and at the same time the other [illegible]
time of the collision [illegible]
east south of the Dunham car. [illegible]
e did not see the [illegible]
sediately approach the car.

Edward G. Carroll testified [illegible]
sident as brakeman on the head end of the freight train [illegible]
d that he called the air [illegible]
ut the engine [illegible]
, when it stopped, [illegible]
ter it stopped he [illegible]
train and [illegible]
en he saw the passenger train [illegible]
round and went back west to [illegible]
get there before the passenger [illegible]
d the train [illegible] by, but did not see [illegible] the train [illegible].

The evidence further discloses that immediately to the east of the crossing there is a curve and the tracks curve to the right as one looks to the east, the highway to the south of the crossing is comparatively level and the crossing itself is rather rough.

Lawrence Jessup testified that he was driving south on Division Street upon the evening in question and observed the large yellow truck coming from the south going north across the crossing and that when he passed this truck it was north of the freight train, that there were two cars ahead of the witness proceeding south and that there was a gap of nine or ten feet between his car and the one immediately ahead and a like gap of nine or ten feet between that car and the car immediately in front of it. He further testified that as these three cars proceeded south, the crossing flagman was on their right hand side (which would be the westerly side of the Division Street Crossing), and that the flagman told the witness to "hurry up, get across". That after he had crossed the tracks, he stopped and looked back and saw the collision and saw the flagman waiving his lantern and blowing his whistle and that at that time "he was about in the center of the track, closer to the highway on the south side" and that he got there by passing behind his (Jessup's) car after it had passed over the tracks. He further testified that there were three cars going each way across the crossing and that the last car, the third one going north, was the one that was hit and that it continued on past the flagman and in front of the oncoming passenger train. This witness further testified that he did not see the Hamilton car and insisted that it was the last car over the crossing that was involved in the collision. The testimony of Mr. Jessup was corroborated in most particulars by Mrs. Jessup.

Charles Bringe testified that on the evening in question he was driving the truck which was in front of the car which appellee's ine testate was driving. That attached to his truck was a trailer and

the truck and trailer were fifty feet in length, with four wheels under the truck and six under the trailer. That after the flagman signalled with his lantern for this witness to proceed, he did so amd that the flagman then went to the west side of the right of way, that he, Bringe, proceeded across the tracks and did not see the train approaching but heard the whistle after he had passed over the tracks. It was stipulated that the Buches car was totally demolished as a result of this accident and that both the engineer and fireman of the train involved therein are dead, that the life expectancy of the widow is twenty-eight years and it further appears that appellee's intestate was survived by his widow and one daughter, ten years old at the time of her father's death.

Miles Lyons, a former employee of appellant was called as a witness for appellee and testified in chief that traffic over this crossing was from 700 to 1,000 vehicles an hour and upon cross examination stated that while in the employ of ~~the~~ appellant in August, 1927, he made, at appellant's request, a traffic count and that his testimony was based upon that count and that the greatest number of vehicles shown to have crossed at any hour was six hundred thirty-five and that was between ten and eleven o'clock in the morning.

The foregoing is a fair resume of the evidence in this record. In our former opinion we held that this evidence disclosed that appellee's intestate, at the time he was killed, was in the act of crossing appellant's tracks in pursuance to a signal given by one of appellant's servants, and that in the absence of any independent knowledge of danger upon his part he had a right to rely upon the directions as given him by appellant's servant, who was stationed at the crossing for this particular purpose and cited in support of this statement C. & A. Railway Co. v. Winters, 175 Ill. 293, and ~~xxxx~~ Chicago and

the truck and trailer was [illegible]
under the truck and [illegible]
alignment with the [illegible]
and that the frame [illegible]
that he, being, proceeding [illegible]
train approaching, but [illegible]
tracks. It was eliminated [illegible]
as a result of this [illegible]
of the train involved [illegible]
the width is twenty-eight feet [illegible]
intersite was marked by [illegible]
at the time of [illegible] death.

[illegible] opens, [illegible]
for appellee and testified in other [illegible]
was from 700 to 1,000 vehicles an hour [illegible]
stated that while in the vicinity of [illegible]
be made, as appellant's request, [illegible]
was based upon [illegible]
shown to have crossed [illegible]
was between ten and eleven o'clock [illegible]

The foregoing [illegible]
In our former opinion [illegible]
pellee's intestate, [illegible]
crossing appellant's [illegible]
of appellant's servant, [illegible]
knowledge of danger [illegible]
tices as given him by [illegible]
crossing for this particular [illegible]
ment C. & A. Railway Co. v. [illegible]

Alton Railroad Company v. Gore, 202 Ill. 188. Counsel for appellant insist that upon the question whether appellant's flagman negligently invited Buches upon the crossing at the time the passenger train was approaching that the verdict of the jury is manifestly against the weight of the evidence and call our attention especially to the testimony of Mr. and Mrs. Jessup, Mr. Carroll and the flagman. Whether the flagman was negligent under all the facts and circumstances in evidence was a question of fact for the jury to determine as well as the weight to be accorded the testimony of all the several witnesses who testified. Mr. & Mrs. Jessup both testified that when the car in which they were riding got on the crossing, it passed the truck coming from the south when it, the truck, was north of the freight train. If this is true, the jury would be warranted in finding that the car of the deceased was at that time directly in the path of the oncoming passenger train. We are of the opinion that the jury were warranted in finding from all the evidence that the flagman invited appellee's intestate to enter the crossing and that after doing so the flagman placed himself in a position whereby he could not warn Buches of the danger from the unexpected approach of the passenger train. In Pokora v. Wabash R.R.Co., 54 S. Ct. Reporter, 580, at page 583, the court said: "Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of the jury." And in the instant case we are not inclined to interfere with the judgment of the jury which found appellant's servant negligent and appellee's intestate in the exercise of due care.

It is next insisted that it was error to permit the witness Lyons to testify that traffic over this crossing was from seven hundred to one thousand vehicles an hour. Upon cross-examination it was shown that the greatest number, when an actual count was taken, was six hundred thirty-five. Some of the counts of the declaration charged the defendant with general negligence in the operation of its passenger train. Under this averment proof of the extent to which this crossing was used would be proper and material to be considered by the jury and this evidence, together with other evidence found in the record as to the extent of the traffic over this crossing was competent. Taylor v. Alton and Eastern Ry. Co., 258 Ill. App. 293. Overtoom v. C.& E.I. R.R.Co., 181 Ill. 323. Counsel further argue that it was error to permit counselfor appellee to attempt to show that the crossing flagman was inexperienced. Upon cross-examination of the watchman, he testified that he had only been on this job as watchman since the Monday preceding the accident which occurred on Thursday. This testimonmy was objected to and in response to the court's inquiry as to what that had to do with the case, appellee's counsel made the statement that it was offered for the purpose of showing that appellant had an inexperienced man there. Over appellant's objection, appellee's counsel was them permitted to inquire of the witness how he came to be there, and he stated that he was substituting for the regular flagman. It is further insisted by counsel for appellant that it was error to permit a witness to testify that prior to his death, Buches had a gross income of $50.00 per week between April and October, 1929. Upon cross examination it developed that his net income would be about $10.00 a week less than that amount. It further appeared from the evidence that during this perior of time Buches was the owner of a summer resort at Lake

It is next insisted that it was error to [illegible] the w[illegible]
yone to testify that traffic over this [illegible] was [illegible]-
red to one thousand vehicles an hour. Upon cross-examination [illegible]
hown that the greatest number, when a count was taken, was
ix hundred thirty-five. Some of the counts [illegible]
he defendant with general negligence in the operation of [illegible]
rain. Under this averment proof of the ordinary [illegible] crossing
as need would be proper and material to be considered [illegible]
his evidence, together with other evidence found in the record [illegible]
he extent of the traffic over this crossing [illegible]. Taylor
. Alton and Eastern Ry. Co., 223 Ill. App. 528. Pritchard v. [illegible] C.
.R. Co., 181 Ill. 323. Counsel further claims that it was error to
ermit counsel for appellee to attempt to show that the crossing flag-
an was inexperienced. Upon cross-examination of the witness, he
estified that he had only been on this job as watchman since the
onday preceding the accident which occurred on Thursday. This testi-
ony was objected to and in response to the court's inquiry as to what
hat had to do with the case, appellee's counsel [illegible]
hat it was offered for the purpose of showing that [illegible]
nexperienced man there. Over appellant's [illegible], [illegible]
he then permitted to inquire of the witness how he came to be there,
nd he stated that he was substituting for the regular watchman. It is
urther insisted by counsel for appellant that it was error to permit
witness to testify that prior to his death, [illegible]
$30.00 per week between April and October, 1927. [illegible]
on it developed that his net income would be [illegible]
han that amount. It further appeared from the evidence that during
his period of time Bunnes was the only [illegible]

Delavan and ran a gasoline station and sold lunches, that he was assisted by his wife, that the business was profitable only in summer and that he had no employment or income during the winter months. We do not think there was any reversible error in the rulings of the trial court with reference to any of his testimony.

It is next insisted that counsel for appellee was guilty of improper conduct during the trial of the cause and made prejudicial remarks in his argument to the jury. The improper conduct complained of is that counsel, during the progress of the trial, characterized the crossing where the accident happened as "heavily trafficed" and later inquired upon cross examination of the crossing watchman whether the passenger train was on time. An objection was made and sustained to several such questions and we are unable to see that appellant's cause was prejudiced by such conduct of counsel. Upon the argument, counsel for appellee, after commenting upon Mr. Jessup's testimony, stated that unfortunately he was blind. The evidence was that Mr. Jessup was blind in his left eye and of course counsel for appellee had a right to comment upon it. Counsel for appellee in his argument also said: "I am representing that his wife became a widow and I am representing that the child became an orphan without a father. The woman's mourning period is over. We didn't want sympathy and that is true." While these last remarks should not have been made, the trial court promptly sustained objections thereto and we do not believe appellant's case was prejudiced thereby.

Counsel for appellant finally insist that the instructions were erroneous and that they did not form a continuous and connected narrative. The instructions started out as follows, viz: "This is a case brought by the administrator of the estate of Stanley Buches, deceased, against the defendant, under the statute, to recover pecuniary damages to the

[illegible] and [illegible] [illegible], [illegible]
[illegible]ated by his wife. [illegible] in [illegible]
[illegible] that he had no [illegible] or [illegible] during [illegible].
[illegible] do not think [illegible] any [illegible] error in the [illegible]
[illegible]rial court with not [illegible] of the [illegible].

It is next [illegible] [illegible]
improper conduct during [illegible] of the [illegible]
[illegible]marks in his argument to the jury. [illegible]
[illegible] is that counsel, during the [illegible], characterized
the crossing where the accident happened as "heavily trafficked" and [illegible]
required upon cross examination if the [illegible] whether the
passenger train [illegible] time. [illegible] led to
several such questions and we are [illegible] that [illegible] cause
was prejudiced by such conduct of counsel. [illegible] argument, counsel
for appellee, after commenting [illegible], stated
that unfortunately he was blind. The [illegible] he was [illegible]
blind in his left eye and of course counsel for appellee had a right
to comment upon it. Counsel for appellee in his argument [illegible]
I am representing that his wife [illegible] and I am [illegible]
that the child became an orphan at [illegible]. The [illegible] in
[illegible] period is over. [illegible]
these last remarks should not have [illegible]
sustained objections thereto [illegible]
[illegible] prejudiced thereby.

Counsel for appellant finally [illegible] that the instructions were
erroneous and that they do not [illegible] the [illegible].
The instructions started are as follows, viz: [illegible]
by the administrator of the estate of [illegible], deceased, against
the defendant, and for the defendant, we [illegible]

widow and next of kin of said deceased, for injuries and the death of said Stanley Buches, charged to have been caused by the negligence of the defendant at the railroad and highway crossing in the city of Harvard in McHenry County, Illinois on the 24th day of October, 1929.

"The court instructs the jury that this case is being tried upon issue joined upon the several counts in plaintiff's declaration. The first count of the plaintiff's declaration charges that defendant railroad company was, at the time of the alleged accident, possessed of and operating a certain locomotive and train under the care and management of the servants of defendant and that due to the improper, careless and negligent manner of operating said train, it struck and killed the deceased, Stanley Buches, at a time when he was using due care and diligence for his own safety, thereby depriving his widow Rose Buches and his daughter Julia Buches of their means of support." The instructions then informed the jury that the second count had been withdrawn and advised them what the charges of negligence were in the remaining counts of the declaration. No good purpose could be served by further setting forth the instructions as read to the jury. They were in a narrative form and substantially complied with the statute. It is the contention of counsel for appellant, however that the court disregarded Section 67 of the Civil Practice Act because the instructions were upon separate sheets and that the word "given" was written on each sheet by the court. We have examined the record and while under the practice which obtained at the time this cause was tried the word "given" had no place upon the various sheets containing the instructions we are unable to see that appellant was in any way prejudiced thereby. We have also considered the several objections thereto urged by counsel, but in our opinion no reversible error was committed by the trial court in the giving of the instructions.

low and next of kin of said deceased, for injuries and the death
said Stanley Bunbes, claimed to have been caused by the negligence
the defendant at the railroad and highway crossing in the city of
vard in McHenry County, Illinois on the 26th day of October, 1922.

"The court instructs the jury that this case is being tried
on issue joined upon the several counts in plaintiff's declaration.
first count of the plaintiff's declaration charges that defendant
ilroad company was, at the time of the alleged accident, engaged
and operating a certain locomotive and train under the care and
agement of the servants of defendant, and that due to the proper,
eless and negligent manner of operating said train, the locomotive and
lled the deceased, Stanley Bunbes, at a time when he was in the due
e and diligence for his own safety, thereby bereaving his widow
e Bunbes and his daughter Julia Bunbes of their means of support."

instructions then informed the jury that the second count had
n withdrawn and advised them what the charges of negligence were in
remaining counts of the declaration. No good purpose could be
ved by further setting forth the instructions as read to the jury.
y were in a narrative form and substantially complied with the
tute. It is the contention of counsel for appellant, however
t the court disregarded section 61 of the Civil Practice Act because
instructions were upon separate sheets and that the word "Given"
written on each sheet by the court. [illegible]
while under the practice which obtained at the time this case
tried the word "Given" had no place upon the various sheets
taining the instructions. We are unable to see that appellant was
any way prejudiced thereby. We have also considered the several
jections thereto urged by counsel, but in our opinion no reversible
or was committed by the trial court in the giving of the instructions.

The questions of fact raised by the pleadings in this case were presented to a jury which found those issues in favor of appellee. The record, in our opinion, is free from any error requiring a reversal of the judgment rendered upon those findings of the jury and therefore that judgment must be affirmed.

JUDGMENT AFFIRMED

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 598

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9012. AGENDA NO. 1.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1936.

EMBERT ERICKSON, ADMINISTRATOR
OF THE ESTATE OF EARL J. ERICKSON,
DECEASED,
Appellee,

vs.

FRED BALL,
Appellant.

Appeal from Circuit Court
Boone County.

WOLFE J.

Embert Erickson, as Administrator, of the estate of Earl J. Erickson, deceased, started suit in the Circuit Court of Boone County, against Fred Ball, to recover damages for the death of the said Earl J. Erickson.

On or about June 27, 1931, a Chevrolet gravel truck driven by Earl J. Erickson, deceased. and a Reo milk truck driven by Fred Ball collided. The collision took place just North of, or, on the North edge of a bridge on the Poplar Grove road about one-half mile North of the village of Poplar Grove. The road over said bridge, runs North and South. The Erickson truck was being driven in a Northerly direction and the Ball truck in a Southerly direction. As a result of this collision, Earl J. Erickson was killed. Trial was had and a verdict rendered in favor of the plaintiff, for the sum of $2,500.00. A motion for a new trial was overruled and judgment entered on the verdict. The case has been appealed to this Court for review.

[illegible]

This case was before this court at the October Term, A.D. 1933, as general number 8675, at which time we reversed and remanded the case to the trial court for a new trial, because of erroneous instructions given by the Court to the jury. The evidence on this appeal is practically the same as in the trial of the case the first time. The plaintiff introduced a number of witnesses, who gave their version of how the accident occurred, the position of each truck, and the conditions as they saw them at the scene of the accident. The defendant called an equal or greater number, who gave their version of the same things. The appellant now seriously insists that the verdict of the jury is contrary to the manifest weight of the evidence and therefore the judgment of the trial court should be reversed. This Court and other Courts have frequently held, that unless the verdict of the jury is manifestly against the weight of the evidence, a court of review should not set aside a verdict of a jury. The jury and the trial court are in a much better position to weighthe evidence and pass upon the credibility of the witnesses than a court of review. They have the benefit of seeing the witnesses on the stand, hearing their testimony and observe their demeanor while on the stand. While this evidence is very conflicting, this court cannot say that the verdict is manifestly against the wright of the evidence. The judgment should not be reversed for that reason.

The appellant contends that the court's instruction No. 8, does not state the law and should not have been given. This instruction was given, for the purpose of assisting the jury, (if they found the issues in favor of the plaintiff) in fixing the amount of damages, and the elements that they could

This case was heard in [illegible]

A.D. 1952, as general [illegible]

and remanded the case to the [illegible]

cause of erroneous instructions given by [illegible]

The evidence on this [illegible] in the

trial of the case the first time. The plaintiff introduced a

number of witnesses, who [illegible] verdict [illegible] the accident

occurred, the condition of each [illegible] vehicle

as they saw them at the [illegible] of the accident. The defendant

called an equal or greater number, [illegible]

the same things. The credibility [illegible]

verdict of the jury is [illegible]

evidence and therefore the judgment [illegible]

be reversed. This court and other [illegible]

that unless the verdict of the jury [illegible]

weight of the evidence, a court of review should not set aside

a verdict of a jury. The jury and the trial court are in a

much better position to weigh the evidence and [illegible]

credibility of the witnesses than a court of review. They have

the benefit of seeing the witnesses on the stand, hearing their

testimony and observe their demeanor while on the stand. [illegible]

this evidence is very contradictory, this court [illegible]

the verdict is manifestly [illegible]

The judgment should not be reversed [illegible]

The appellant [illegible]

No. 9, does not state the law [illegible]

This instruction was given, [illegible]

jury, (if they found the [illegible]) in

fixing the amount of damages, [illegible] they could

take into consideration, in arriving at the amount that should be allowed to the plaintiff. The appellant does not claim that the judgment is excessive. This point is not urged in the errors relied upon for reversal. This Court in the case of Greenacre vs. Aurora Brewing Company, 200, Ill., Appellate page 193, held that any error in giving an improper instruction on the measure of damages is harmless where there is no claim that the damages are excessive. The sufficiency of instruction No. 8, has been waived by the defendant in not assigning error that the verdict of the jury is excessive.

We find no reversible error in the case, and the judgment of the Circuit Court of Boone County is hereby affirmed.

Affirmed.

take into con[illegible] de[illegible]tion, [illegible]

be allowed to [illegible] [illegible].

that the jud[illegible]ment is [illegible]

the error relied [illegible]

of Greenore va. [illegible]

page 138, [illegible]

on the [illegible]

that [illegible]

No. 8, [illegible]

that the [illegible]

[illegible] find no reversible error [illegible], and the judgment

of the Circuit Court [illegible] affirmed.

[illegible].

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 598

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9028 AGENDA NO. 7.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1936.

ANNIE DENNEHY,
Plaintiff and Appellee,

vs.

W. A. WOOD CO., a Corporation,
Defendant and Appellant.

Appeal from the Circuit Court of Peoria County, Illinois.

WOLFE J.

This is an action instituted by Annie Dennehy, the appellee, against the appellant, W.A.Wood Company, a corporation, for damages resulting from injuries sustained by her on August 19, 1933. The accident is alleged to have been caused by an Essex Coupe owned by the defendant and operated by Lewin Elliott, one of the defendant's salesmen. The complaint was originally instituted against W.A.Wood Company and Lewin Elliott, but was dismissed as to the latter on the motion of the plaintiff at the close of her case. This action was taken after the court had refused to direct a verdict in favor of the defendant W.A.Wood Company.

The complaint consists of two counts. The first alleges that the defendant, the W.A.Wood Company, was the owner of a motor vehicle which was being operated on Bradley Avenue, at the intersection of Underhill Street in Peoria, Illinois; that the plaintiff alighted from a street car, and while walking in an easterly direction on Bradley Street, (which is a residential portion of the incorporated City of Peoria) in the exercise of due care and caution for her own safety was struck by said

M. NO. 9028

I

NIE DENNEHY,
Plaintiff and Appellee,

vs.

A. WOOD CO., a corporation,
Defendant and Appellant.

ITE J.

This is an action instituted [illegible]
that the appellant, [illegible]
ulting from injuries [illegible]
ident is alleged to have [illegible]
endant and operated by [illegible]
. The complaint was originally [illegible]
Lewis Elliott, but [illegible]
plaintiff at the close [illegible]
court had proceeded to direct [illegible]
..Wood Company.

The complaint [illegible]
endant, the A. Wood [illegible]
being operated [illegible]
eet in Peoria, Illinois; that [illegible]
, and while walking in [illegible]
a residential portion of the [illegible]
e of due care and caution [illegible]

automobile when it was being negligently operated at a speed greater than was reasonable and proper as provided in the Illinois Statute. The sixth paragraph of count 1, also alleges that the defendant, through its agent and servant Lewin Elliott, carelessly, negligently and improperly namaged said automobile, and as a result thereof the plaintiff was injured.

The second count of the petition is the same as count 1, relative to the location, time and identity of the parties. The plaintiff charges that the defendant was negligent in failing to give any reasonable warning of the approach of said automobile and thereby the plaintiff was injured and sustained damages.

The answer of the defendant, the W.A.Wood Company, is as follows: "Denies paragraph one of count one of the complaint." The answer in the same language denies each and every paragraph of Counts 1 and 2 of the complaint.

The case was tried before a jury. At the close of the plaintiff's case, the defendant presented its motion and instruction to find the defendant not guilty. This motion was denied and the instruction refused. At the close of all the evidence, the defendant, W.A.Wood and Company, presented an instruction and filed its motion for the court to instruct the jury to find the defendant not guilty. This motion the court took under advisement and reserved his decision on said motion until after the verdict of the jury. The jury found the issues in favor of the plaintiff and assessed her damages at $13,500.00. After the verdict the court overruled the defendant's motion for a directed verdict. The defendant then made a motion for judgment notwithstanding the verdict. The court likewise overruled this motion and entered judgment in favor of the plaintiff for $13,500.00 The W.A.Wood company have brought the case to this court for review.

The appellants insist that the trial court erred in not sustaining their motion for directed verdict at the close of the plaintiff's case, because the evidence is not sufficient to show that Lewin Elliott, at the time of the accident, was the agent and servant of W.A.Wood Company.

The appellee insists that the issue, of the scope of employment of Lewin Elliott, is not in the case, as it has not been raised by proper pleading. Under the old form of practice, the plea of general issue did not traverse ownership or operation of an automobile in a personal injury case. "Muller vs. Hayes, 321, Ill., 275." The appellee contends that the answer of the appellant is simply a general denial of each and every allegation of the petition, and therefore, it means nothing more than the old plea of general issue.

Section 1, paragraph 40, of the present Practice Act provides as follows: "The general issue shall not be employed and every answer and subsequent plea shall contain explicit admission or denial of each allegation of the plea to which it relates." The answer in the present case denied each and every paragraph of the petition. It is our opinion that it complies with the practice act and that the answer denies that Lewin Elliott was the agent and servant of the appellant at the time of the accident.

The evidence shows that Lewin Elliott was employed by the W.A.Wood Company as a salesman for two or three months just preceding and at the time of the accident in question; that the appellant was engaged in selling new and used automobiles; that W.A.Wood was the President of the corporation and had active supervision of the business and the salesmen; that the appellant maintained a used car department at 1026 South Avenue Street, Peoria, Illinois; that used cars were displayed at this place in a building, and on the sidewalk and near the curb in front of the building; that it was customary for Lewin Elliott and the other salesmen to be on duty at the used car department every night; that these salesmen ordinarily ran the cars into the garage before they went off duty, around 9:00 o'clock P.M.; that there was no written contract between the appellants and the salesmen, but they were given oral instructions when they were employed and further instructions from day to day by some officer of the company; that these salesmen worked in and around the garage and took out these cars to demonstrate

The appellee insists that the issue, [illegible] or not, [illegible]
Lewis Elliott, is not in the case, [illegible]
per pleading. Under the old [illegible]
we did not traverse over [illegible] the [illegible] in
sonal injury case. [illegible]
tends that the [illegible]
enough and every allegation [illegible]
thing more than the old [illegible] of [illegible] I am.

Section 1, paragraph [illegible], of the present [illegible] is
lows: "The general issue shall not [illegible]
agement plea shall contain explicit [illegible]
egation of the plea to which it relates. [illegible]
e denied each and every [illegible]
t it complies with the [illegible]
in Elliott was the [illegible]
the accident.

The evidence shows that [illegible]
pany as a salesman for two or three months [illegible]
e of the accident in question; [illegible]
lling new and used automobiles; that [illegible]
corporation and had entire supervision of [illegible]
esman; that the appellant maintained a [illegible]
th Avenue Street, Peoria, Illinois; that [illegible]
this place in a building, [illegible]
nt of the building; that it was [illegible]
er salesman to be on duty [illegible]
t these salesmen ordinarily ran the [illegible]
t off duty, around 9:00 o'clock [illegible]
tract between the appellants and [illegible]
l instructions when they were employed [illegible]
m day to day by some officer of the company; [illegible]
ked in and around the garage and [illegible]

them and look up prospective customers.

A short time before the accident in question, a prospective purchaser (Willard Mahnesmith) called at the used car department looking for a coupe. The salesman Lewin Elliott, had talked to him about the sale of a car. On the evening of August 19, about 8:00 o'clock, the salesmen on duty at the used car department told Elliott to take an Essex Coupe and see if he could catch Mahnesmith at home and try to sell him the car. Elliott and William Holton, the other salesmen, made arrangements for Holton to take care of the cars and run in the garage the ones on display outside. Elliott drove the Essex Coupe to the Mahnesmith home, a distance of 17 blocks through the business section of Peoria. This trip was made for the purpose of selling one of the appellant's automobiles. After driving to the home of Mr. Mahnesmith, and finding no one there, Mr. Elliott started to drive his employer's car to his own home, when the accident occurred and the plaintiff was injured.

It was the custom of Lewin Elliott and the other salesmen to use the Company's cars in going to and from their own residence to the garage. They kept the cars at their homes at night. Mr. Elliott had kept the same car at his home on the night before the accident. Elliott testified that he was taking the car home and was going to store it and then get his father's car to make a personal call. We have not attempted, in this opinion, to set out all the evidence as to the agency of Elliott of the appellant as disclosed by the record.

The appellant does not contend that the jury was not properly instructed relative to the law of the case. One of the given instructions is as follows: "In order for the plaintiff to recover in this case she must establish by a preponderance of the evidence, under the law as defined in these instructions given to you by the Court, the following three propositions: (1) That at the time of the accident in question, Lewin Elliott was operating the automobile within the scope of his employment as agent or servant of the defendant W.A.Wood Company, and that in such operation was guilty of negligence

them had lo[illegible]

[illegible] ener[illegible]

purchaser ([illegible]

looking [illegible]

him about the [illegible]

8:00 o'clock [illegible]

pilot to [illegible]

at home and [illegible]

the other [illegible]

the cars [illegible]

drove [illegible]

through [illegible] cabin

purpose [illegible]

to the home [illegible]

started to [illegible]

accident occurred [illegible]

It was [illegible]

the Company [illegible] the

garage. They [illegible]

and kept the [illegible]

pilot [illegible]

store it and [illegible]

have not arrived, [illegible]

to the agency [illegible]

The [illegible]

instructed [illegible]

structions [illegible]

in this case [illegible]

under the law [illegible]

Court, the following [illegible]

the accident [illegible]

within the scope of [illegible]

U.A. food Company [illegible]

as charged in one or more counts of the plaintiff's declaration. (2) That such negligence, if any, was the direct and proximate cause of the injuries alleged to have been sustained thereby by the plaintiff. (3) That the plaintiff was herself in the exercise of ordinary care and caution for her own safety at the time of the injuries complained of, and immediately prior thereto, and was not guilty of any act, or omission to act, by reason of the failure to use due care and caution, which contributed to the injuries in question."

Another given instruction is as follows: "If you find from the evidence that Lewin Elliott, at the time of the accident in question was on his way to his home, and that in so traveling toward his home he was not serving the defendant, W.A.Wood Company, but was taking the automobile in question to his home for his own convenience, then you should find the defendant, W.A.Wood Company, not guilty, even though you should find from the evidence that Lewin Elliott was guilty of the negligence charged in some count of plaintiff's declaration."

The reading of these two instructions discloses that the jury were told in certain terms that the burden of proof was on the plaintiff to prove, that at the time of the accident in question, Lewin Elliott was operating the automobile within the scope of his employment as agent or servant of the defendant, W.A.Wood Company. The second quoted instruction tells the jury that if Lewin Elliott at the time of the accident in question was on his way to his home and was not serving the defendant, W.A.Wood Company, but was taking the automobile in question to his home for his own convenience, they should find the defendant not guilty. Each of these instructions squarely presented a question of fact for the jury to decide, viz: Was Lewin Elliott at the time of the accident in question operating the automobile within the scope of his employment as agent or servant of the defendant W.A.Wood Company? It is not questioned but that

as charged in [illegible]

(2) That such [illegible]

of the injuries [illegible]

tiff. (3) That the plaintiff [illegible]

dinary care and caution [illegible]

complained of, [illegible]

any act, or [illegible]

care and caution, [illegible]

Another [illegible]

evidence that [illegible]

was or his [illegible]

he was not [illegible]

the automobile in [illegible]

you should find the defendant, [illegible] fully, even

though you should find [illegible]

guilty of the negligence charged in [illegible] count of the declaration.'

The reading of these two instructions [illegible]

were told in certain terms [illegible]

plaintiff's [illegible]

Lewis Tillit [illegible]

employment as a [illegible]

The second quoted instruction [illegible]

at the time [illegible]

and was not [illegible]

the automobile [illegible]

should find the [illegible]

equately presented [illegible]

was Lewis Tillott [illegible]

the automobile [illegible]

of the defendant [illegible]

these two instructions properly presented the law of the case. The jury by their verdict found the issues in favor of the plaintiff. This was a question of fact for the jury to decide under proper instructions, and after reading the whole of the evidence, it is our conclusion that the verdict of the jury is not against the manifest weight of the evidence.

It is ~~the~~ next insisted that the appellant's car did not strike the appellee, and the verdict of the jury is manifestly against the weight of the evidence in this respect. ,The plaintiff testified that she alighted from a street car and started toward the sidewalk at the edge of the curb, when she was struck and knocked down by the automobile of the defendant. There were several eye witnesses to the accident and they disagree somewhat in regard to just what happened at the time. Some of them thought the automobile struck the plaintiff; others said they did not see it strike her. Three witnesses who were present at the home of Annie Dennehy, testified that they heard Nellie Dennehy say to Lewin Elliott, "Are you the man that hit her?" And that Elliott replied, "Yes, I hit her." These questions, as well as the question of whether the plaintiff was guilty of any contributory negligence that was the proximate cause of her injuries, were questions of facts for the jury to decide. They had the advantage of seeing and hearing the witnesses testify and observing their demeanor upon the stand and were in a much better position to judge the credibility of the witnesses and weigh their testimony than a Court of Review. It is our conclusion that the evidence in the case justified the finding of the jury; that it was the negligent operation of the automobile in question that caused the injuries to the plaintiff and she was not guilty of any contributory negligence that was the proximate cause of her injuries.

Another assignment of errors relied upon for a reversal is, "that the verdict is excessive and is a result of sympathy, passion, and prejudice." The recital of the facts concerning the plaintiff's

these two [illegible]
jury by their verdict [illegible]
This was a question of [illegible]
instructions, and [illegible]
our conclusion that [illegible]
manifest weight of [illegible]

It is [illegible]
the appellee, and the [illegible]
weight of the evidence in [illegible]
that she fell from a [illegible]
at the edge of the curb, [illegible]
the automobile or [illegible]
the accident. [illegible]
happened at the time. [illegible]
the plaintiff; [illegible]
witnesses who were [illegible]
that they saw and [illegible]
men that fell [illegible]
These men, [illegible]
was guilty of [illegible]
cause of her injuries, [illegible]
decide. They are [illegible]
testify and observe [illegible]
much better [illegible]
weigh their testimony [illegible]
that the evidence in [illegible]
that it was the [illegible]
that caused the injuries [illegible]
of any contributory [illegible]
injuries.

Another [illegible]
"that the verdict [illegible]
and prejudice." The [illegible]

injuries and the arguments of counsel relative to the verdict being excessive are very, very meager and gives this court scant information in regard to either the injuries or the law applicable thereto. It seems to us the verdict for $13,500.00 is very liberal for the injuries sustained, but we cannot say that it is a result of passion or prejudice on the part of the jury.

The appellee has assigned cross-errors in regard to the admission of evidence offered on behalf of the defendant on the trial of the case. This evidence was given over the objection of the plaintiff. The conclusions we have reached from an examination of the whole record makes it unnecessary for us to pass on the cross-errors assigned by the appellee.

We find no reversible error in this case and the judgment of the circuit court of Peoria County is hereby affirmed.

AFFIRMED.

injuries and the [illegible] being excessive are very, very [illegible] information in regard to either the injuries [illegible] thereto. It seems to us the verdict [illegible] for the injuries we [illegible], but we cannot say that it is [illegible] of passion or prejudice on the part of the jury.

The appellee has contended [illegible] admission of evidence offered on behalf of the defendant [illegible] trial of the case. This evidence [illegible] the liability of the plaintiff. The conclusion [illegible] of the whole record [illegible] cross-errors [illegible].

We find no reversible error in the case and the judgment of the circuit court of [illegible] County is hereby affirmed.

AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 598[3]

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 9031 Agenda No. 10

In the Appellate Court of Illinois

Second District

February Term, A. D. 1936.

Stanley Boski,

(Plaintiff) Appellee,

vs.

Anthony Durka,

(Defendant) Appellant,

Appeal from the Circuit Court of Lake County

WOLFE, J.

In January 1933, the plaintiff, Stanley Boski, filed a suit in the Circuit Court of Lake County, against the defendant, Anthony Durka. The defendant, by his attorney George S. McGaughey, filed an appearance as follows: "I hereby enter the appearance of Anthony Durka, as the defendant in the above entitled cause and myself as attorney herein." On the same date, on motion of said attorney, the time for the defendant to plead was extended for 20 days. On the 13th day of March, 1935, the following order was entered by the Court, "This cause being called for trial it is ordered by the Court that said suit be and the same is hereby dismissed for want of prosecution."

On March 18, 1935, the following order was entered in said case. "This day comes G. C. Snyder associate counsel for the said plaintiff and on his motion it is ordered that the order of dismissal heretofore entered herein on March 13, A.D. 1935 be, and the same is hereby vacated and set aside and said cause reinstated. And comes also George S. McGaughey, attorney for the defendant herein, and on his motion, it is ordered that his appearance as such attorney be and the same is hereby withdrawn and that the appearance of Hall and Hulse be, and the same is hereby substituted therefor."

On May 7, 1935, the plaintiff filed his complaint at law

Gen. No. 4031

[illegible]

In the [illegible]

[illegible]

[illegible]

Stanley Cosel,

(Plaintiff [illegible]),

[illegible] Court

vs.

[illegible]

Anthony Weke,

(Defendant) [illegible] Plaintiff.

WOLFE, J.

In January 1935, the plaintiff, [illegible] suit in the circuit [illegible] Anthony Weke. [illegible] filed an appearance [illegible] of Anthony Weke, [illegible] and myself as attorney [illegible] of said attorney [illegible] tended for 30 days. [illegible] ing order was entered by the [illegible] trial it is ordered [illegible] is hereby dismissed for want of prosecution.

On March 12, 1935, [illegible] said case. [illegible] the said plaintiff [illegible] order of dismissed [illegible] 1935 be, and [illegible] cause reinstated. [illegible] for the defendant herein, [illegible] his appearance as such [illegible] drawn and that the appearance of [illegible] same is hereby [illegible].

On May 7, 1935, the plaintiff [illegible]

consisting of three counts in which he charges that he was employed as a carpenter bynthe defendant at the rate of $40.00, per week plus room and board, and that later this contract was modified, and he was to work shorter hours and receive $32.00, per week plus room and board. He further alleges, that under said contract, he worked 25 weeks from May 1932, to October, 1932, and earned the sum of $957.00. He gives the defendant credit for payment of $310.00, and asks judgment for $647.00.

The defendant filed an answer in which he denies that he hired plaintiff for a stipulated sum of $40.00 per week or that the plaintiff worked for him from May to October in 1932. He denies that the oral contract of $40.00 per week was modified to $32.00 per week plus board and room or that the plaintiff continued to work for him from October 3, to October 28, at such rate. He denies that there became due and payable from himself to the plaintiff the sum of $957.00. He denies that he paid the plaintiff only the sum of $30.00. He further denies that he had not paid the plaintiff the sum of $647.00.

The record shows that without objection upon the part of the defendant, the case was submitted to a jury and evidence was introduced on each side to support their pleadings. At the conclusion of the evidence and arguments of counsel, the plaintiff and defendant stipulated that the jury might return a sealed verdict. The jury found the issues in favor of the plaintiff and assessed his damages at $647.00.

The defendant made a motion for a new trial which the Court overruled, also a motion in arrest of judgment, which was likewise overruled. The Court entered judgment on the verdict in favor of the plaintiff in the sum of $647.00,

and costs of suit were assessed against the defendant, who brings the case to this Court for review.

The appellant, claims the trial court lost jurisdiction of the case when it was dismissed for want of prosecution, and therefore the order entered on March 18, reinstating the case was a nullity. An examination of the record discloses that this point was not urged in the trial court, but raised for the first time in this Court. On the same day that the case was reinstated Hall and Hulse entered their appearance as attorney's for the defendant and proceeded to hear the case. No objection was made that the Court did not have jurisdiction of the parties or subject matter of the suit. Any objection that the defense might have raised as to the jurisdiction of the Court has been waived by the general appearance of the defendant and submitting the case for trial without objection.

At the conclusion of the trial, neither the plaintiff nor the defendant presented any instructions for the trial court, nor made any suggestions, as to how the court should instruct the jury. The court did not give any instructions to the jury. The defendant now assigns this as error. At the time the defendant filed his motion for a new trial in the trial court, he set forth the following causes in support of his motion for a new trial. "The verdict is contrary to the weight of the evidence. The verdict is against the law. The verdict is against the law and the evidence. The court admitted improper and illegal evidence offered by the plaintiff over the objection of the defendant. There is no sufficient or substantial evidence to support the verdict." It will be observed that in this motion there is no mention made that the court did not have jurisdiction of the defendant, and the subject matter of the suit, and also

and costs of suit were [illegible]

brings the case to this Court [illegible]

The appellant, [illegible]

of the case when it was dismissed [illegible]

and therefore the order [illegible]

case was a nullity. [illegible]

that this point was not [illegible]

for the first time in this court. [illegible]

case was reinstated [illegible]

as attorneys for the [illegible]

case. No objection [illegible]

isdiction of the [illegible]

objection that [illegible]

diction of the Court [illegible]

of the defendant [illegible]

objection.

At the [illegible]

nor the defendant [illegible]

nor made any suggestion [illegible]

the jury. The court [illegible]

The defendant [illegible]

ant filed his motion [illegible]

set forth the following [illegible]

new trial. The verdict [illegible]

dence. The verdict is against the law. [illegible]

the law and the [illegible]

evidence offered by [illegible]

defendant. There is no sufficient [illegible]

support the verdict. [illegible]

there is no mention [illegible]

of the defendant, and the subject matter [illegible]

no mention is made of the fact that the court failed to instruct the jury relative to the law of the case. These questions are raised for the first time in this court. In the case of Erickson vs. Ward, 266, Ill., Page 259, at page 266, it is said, "It is further contended by defendant that no recovery was authorized because it was not shown plaintiff had a contractor's license, as required by the ordinances of the City of Chicago. Whether there is any merit in this contention we think is not here open to review. Defendant filed a written motion in the trial court for a new trial, assigning twenty-two reasons therefor, but in none of them was it stated that a new trial chould be granted for the reason that it was not proven the plaintiff had a license. Where a party files a written motion for a new trial he will be held to have waived all causes therefor not set forth in his written motion." To the same effect is Lerette vs. Director general 306, Ill., 348. The appellant has waived any right that he had to prevent these questions.

The appellant seriously insists that the trial court erred in not granting him a new trial because the plaintiff had not proven his case by a preponderance of the evidence. He does not now seriously contend that the plaintiff did not do the work which he testifies he performed. nor that he agreed to pay the plaintiff the amount claimed by him, but he insists that the plaintiff has been paid in full for all the work which he did for him. The plaintiff's Exhibit 1, and 1A, were admitted in evidence and they show the earnings of the plaintiff and the money received from the defendant therefor. The defendant's Exhibit 1, shows a check in payment to Stanley Boski, from Tony Durka in the sum of $8.00, with an indorsement on the reverse side as follows: "Paid Ful Stanli Boski 5 Dec.--1932 Stanli Boski A Stasevich Staley Boske Signed hims im self."

no mention is made [illegible]
the jury motions [illegible]
raised for [illegible]
vs. Hard, [illegible]
further contended [illegible]
because it was not [illegible]
as required by the [illegible]
there is any merit in [illegible]
open to review. [illegible]
court for a new trial, [illegible]
but in none of them [illegible]
granted for the [illegible]
had a license. [illegible]
trial no will [illegible]
set forth in his [illegible]
vs. Director [illegible]
any right to [illegible]

The appellant [illegible]
erred in not granting [illegible]
not proven his case [illegible]
does not bar [illegible]
work which he [illegible]
pay the plaintiff [illegible]
that the [illegible]
which he did [illegible]
admitted in evidence [illegible]
and the money [illegible]
defendant's [illegible]
Book, from [illegible]
on the reverse side [illegible]
1932 Stanli Book / [illegible]

The plaintiff Boski testified that, "he could not sign his name "Stanley" and always signed his name S. Boski." "That is all that he ever learned to write."

This case was submitted to a jury for their consideration. They had the benefit of seeing the witnesses on the stand and of hearing them give their testimony, and are in much better position to weigh the evidence and judge the credibility of the witness than a court of review. We would not be justified in setting aside the verdict of the jury unless, we can say that it is manifestly against the weight of the evidence. Whether the plaintiff has proven his contract of employment or accepted the check as payment in full, or had received from the defendant, all money that was due him under the contract, were all questions of fact for the jury to decide. We cannot say from a review of the evidence that this verdict is manifestly against the weight of the evidence.

We find no reversing error in the case and the judgment of the Circuit Court of Lake County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 598

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9040. AGENDA 13.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1936.

J. EDWARD RADLEY
(Plaintiff) Appellant,

vs.

Appeal from the Circuit Court of Peoria County.

PHALEN & COMPANY, INC., a Corporation, GLEN J. HILDEBRAND and KEITH E. FRANK,
(Defendants) Appellees.

WOLFE J.

This is an action brought by J. Edward Radley, an attorney at law, against Phalen & Company, Inc., dealers in securities, and their alleged agents Glen J. Hildebrand and Keith Frank, stock salesmen, to rescind a contract of sale for certain stocks alleged to have been sold by the defendants to the plaintiff, through fraud and misrepresentation.

The complaint alleges that Phalen & Company, Inc., were engaged in the sale of securities; that Glen J. Hildebrand and Keith Frank were selling their securities in the City of Peoria, Illinois; that in August 1933, the defendants sold Class A, common stock, of Gipps Brewing Corporation, and to further the sale of said stock, the defendant, Keith Frank took the plaintiff to the office of Phalen & Company, Inc., in the City of Chicago, Illinois, in August 1933; that while the plaintiff was in the office of the defendant, he talked to various officers and agents of the defendant company about the Gipps Brewing Corporation stock, that relying upon the information given to him, the plaintiff sold 100 shares of Muessel Brewing Company stock for $737.50 and the defendant sold the plaintiff 100 shares of

[illegible]

[illegible]

[illegible] MEMORANDUM [illegible]

(Plaintiff) [illegible]

vs.

[illegible]

[illegible]ALANK & COMPANY, INC., [illegible] Cor-
[illegible]oration, [illegible]
[illegible]d KEITH T. [illegible]

(Defendants) [illegible]

[illegible]ILE 1.

This is on [illegible]

[illegible]pant Thelen [illegible]

[illegible]leged agents [illegible]

[illegible] reading a contract [illegible]

[illegible]ld by the defendants [illegible]

[illegible]ntation.

The complaint [illegible]

[illegible] the sale of [illegible]

[illegible]re selling their [illegible]

[illegible]gust 1955, the [illegible]

[illegible]ewing Corporation, [illegible]

[illegible]endant, Keith [illegible]

[illegible]mpany, Inc., [illegible]

[illegible]ile the plaintiff [illegible]

[illegible]tious offices [illegible]

[illegible]ewing Corporation [illegible]

[illegible]e plaintiff [illegible]

[illegible]37.30 and the [illegible]

Gipps Brewing Corporation stock at a cost of $720.00; that the plaintiff received 240 shares of class A, common stock of said company.

The appellant charges that the defendants represented to him that all shares of the Gipps Brewing Corporation stock had been underwritten and sold, and that the money for the same was available for the company; that all financing had been completed; that the Gipps Brewing Corporation had sufficient funds, or would be delivered sufficient funds from stock sales to enable full payment of all necessary equipment for the manufacture, sale and distribution of beer; that the only indebtedness, after the delivery of these funds, would be a mortgage of $40,000.00; that the Gipps Brewing Corporation would have enough capital, after paying for equipment, to be in actual production of beer within 60 days, and at the most, not more than 90 days.

The complaint further charges that on February 3, 1934, the plaintiff learned that the financing of Gipps Brewing Corporation had been only partially completed, and that only one-half of the stock had been sold; that Phalen & Company, Inc., had arranged with the Refinance Corporation of Chicago, to complete the finance program and start an active campaign to sell 70,000 shares of the unsold stock; that the brewery was completely reconditioned, but could not start active operation because of lack of money; that a creditor had filed a bill to foreclose a mechanic's lien to compel payment of an indebtedness incurred in rebuilding the brewery; that other creditors had not been paid and were threatning to file liens; that unless new financing could be obtained, the brewery would never go into active operation.

Gipps Brewing Corporation stood at [illegible] of $720.00; that the plaintiff received 240 shares of stock, [illegible] company.

The appellant charges that [illegible] represented to him that all shares of the Gipps Brewing Corporation stock had been underwritten and sold, and [illegible] the money for [illegible] available for the company; that all financing had [illegible]; that the Gipps Brewing Corporation had sufficient funds, or would be delivered sufficient funds from stock sales to provide full payment of all necessary equipment for the manufacture, sale and distribution of beer; that the only indebtedness, after the delivery of these funds, would be a mortgage of $[illegible]; that the Gipps Brewing Corporation would [illegible] as [illegible], after paying for equipment, to be in actual [illegible] of beer within 60 days, and at the most, not more than 90 days.

The complaint further charges that on [illegible], 1934, the plaintiff learned that the financing of Gipps Brewing Corporation had been only partially completed, and that only [illegible] of the stock had been sold; that Gipps & Company, Inc., [illegible] with the Reliance Corporation of [illegible], to complete the finance program and start the actual operation to sell [illegible] of the unsold stock; that the financing was completely reconditioned, but could not start active operation because [illegible]; that a creditor had filed a bill to foreclose [illegible] to compel payment of an indebtedness [illegible] the brewery; that other creditors [illegible] to file liens; that unless [illegible], the brewery would never go into active operation.

The petition charges, the representations were made by the defendants to the plaintiff for the purpose of enabling the defendants to dispose of Gipps Brewing Corporation stock held and owned by them, or stock contracted to be sold by them; and that said representations were false and fraudulent. On April 6, 1934, the plaintiff tendered to the defendants the shares of stock which they had sold to him, and demanded a return of $720.00 paid for said stock. The plaintiff asks for an accounting and return of money paid to the defendants and for rescission of the contract.

Phalen & Company, Inc., filed an answer, in which they admit being dealers in securities and that plaintiff visited the office of the defendant in Chicago and sought information about Gipps Brewing Corporation stock. They deny making any false, deceitful, untrue or fraudulent representation or statements, concerning the stock, to the plaintiff or any other person. They admit, that the plaintiff purchased from them 240 shares of stock as alleged in the complaint. They further admit that they were engaged in selling Gipps stock and they do not deny that they owned stock or contracted to dispose of stock as alleged in the complaint.

Glen J. Hildebrand and Keith W. Frank filed their joint answer in which they admit that Hildebrand is a salesman, but alleged that Frank is an employee. They admit that both are agents of Phalen & Company Inc. They state that all information which they had regarding Gipps Brewing Corporation stock, came from Phalen & Company, Inc. The answer admits that the plaintiff visited Phalen & Company's office with Frank and had conversations with Phalen Company agents regarding the sale of the Gipps Stock.

The petition [illegible]

defendants to [illegible]

fencarts to [illegible]

owned by them, [illegible]

said repurchase [illegible]

1924, the plaintiff [illegible]

stock which they had [illegible]

paid for said st[illegible]

return of money [illegible]

contract.

Phelan & Lindsay, Inc., [illegible]

admit being [illegible]

the office of [illegible]

about dirge Prorling [illegible]

false, deceitful, [illegible]

statements, [illegible]

person. They [illegible]

shares of stock [illegible]

admit that they [illegible]

do not deny that they [illegible]

as alleged in the complaint.

Gen. [illegible]

answer in which they [illegible]

alleged that [illegible]

agents or [illegible]

which they had [illegible]

Phelan & Company, [illegible]

visited Phelan [illegible]

with Phelan [illegible]

Each of these defendants denies making any false or fraudulent representations to the plaintiff to induce him to buy the stock and each denies any knowledge of such false and fraudulent representations.

The case was referred to the Master in Chancery to take the proofs and report both his findings of the facts and conclusions of law. The master heard the evidence and filed his report in which he found that no false and fraudulent representations had been made by the defendants to the plaintiffs and that the bill should be dismissed for want of equity. The plaintiff, Radley filed his objections to the Master's report, which was overruled. The court approved the Master's report and dismissed the complaint for want of equity.

Paragraph twenty-two and twenty-three of the Master's report is as follows: 22. "That the evidence in this case fails to show that the defendants, GLENN J. HILDEBRAND AND KEITH W. FRANKS, made any representations in regard to said GIPPS stock that were untrue or were relied upon by the plaintiff in trading for said stock; that the evidence does ~~xx~~ disclose the plaintiff, in trading for said GIPPS stock, relied upon the conversations he had in the office of said PHALEN & CO., INC., with the said Phalen, Cochran and Burley, in the month of August 1933, together with certain investigations he personally made with respect to the value of said stock; that the representations made to the plaintiff in the office of said Phalen & Co., Inc., as aforesaid, were largely based upon the opinions of the parties making such statements as to events that would likely happen in the future; that all the statements made to the plaintiff in Chicago, as above mentioned, as to existing facts were true; that the plaintiff has failed to establish by the evidence that any of the defendants herein knowingly made

each of these defendants [illegible] representations to the [illegible] and each issue any [illegible] representations.

The case was [illegible] the proofs and records both [illegible] situations of law. [illegible] report in which [illegible] tions had been made by the [illegible] the bill should be [illegible] Radley filed his objections [illegible] overruled. The court [illegible] the complaint [illegible].

Paragraph [illegible] is as follows: [illegible] show that the defendant [illegible] made any representations [illegible] nature or were relied upon [illegible] stock; that the [illegible] trading for said [illegible] in the office of said [illegible] Cochran and Dunlap, in [illegible] certain investigations [illegible] value of the stock; that [illegible] in the office of said [illegible] based upon the [illegible] to events that could [illegible] ments made to the [illegible] existing facts were true; [illegible] by the evidence [illegible]

any false statements regarding said Gipps Brewing Corporation or the sale and issuance of said Gipps stock; that it doesn't appear in the evidence the plaintiff has suffered any financial loss as result of said exchange of stocks."

23. "That none of the defendants made any definite representations as to exactly when said brewery would start operations, but the plaintiff was given their opinions as to when it probably would be in full operation; that the plaintiff has failed to prove that the various men he talked to in the office of Phalen & Co., Inc., in the month of August, 1933, had any official connection with said Phelan & Co., Inc., that the plaintiff has failed to establish by the evidence any misrepresentations which would constitute fraud as legally defined; that a decree should be entered in this court dismissing the complaint for want of equity."

It will be observed from reading the Master's report that both he and the trial court were of the opinion that the plaintiff had failed to prove his case, namely; that the defendants made false and fraudulent representations in regard to the sale of this stock, which would justify the court in rescinding the contract. In the case of Krankowski vs. Knapp, 268, Ill., 183, at page 190. Our Supreme Court in discussing what is necessary to allege and prove in a case to rescind a contract of sale used this language. " A misrepresentation, to constitute fraud to authorize equity to rescind a contract on account of such misrepresentation, must contain the following elements: (1) Its form must be a statement of fact; (2) It must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; (6) the

any false [illegible]

the sale [illegible]

in his evidence [illegible]

as result of a [illegible]

28. "It is not [illegible]

tions as to exact [illegible]

the plaintiff's [illegible]

be in full [illegible]; that [illegible]

the various [illegible]

in the month of [illegible], 1[illegible]

Phelan & Co., Inc., [illegible]

evidence by [illegible]

legally defined; [illegible]

misleading the complaint for [illegible].

It will be observed [illegible]

re and the trial court [illegible]

failed to prove [illegible]

fraudulent [illegible]

which would [illegible]

case of [illegible]

Supreme Court [illegible]

in a case [illegible]

disagreement [illegible]

secured [illegible]

contain the [illegible]

of fact; (2) [illegible]

other party [illegible]

statement [illegible]

upon it [illegible]

statement must be material."

Not only must all of the above propositions of law be proven but to justify a Court in rescinding a contract of sale executed by two parties which are dealing at arms length, upon the ground that it was procured by fraud, the testimony must be of the strongest and most cogent character and the case a clear one, Walker vs. Hough 59, Ill., 375, Condit vs. Dady 56, Ill., Appellate 545.

It is our conclusion that the plaintiff did not establish his case by such clear and convincing evidence, that false and fraudulent representations of existing facts induced him to buy the stock in question, but that such representation either related to some future happening or were what is commonly called, "Puffing or trade talk." We are unable to ascertain from this evidence what financial loss the plaintiff has sustained as a result of this transaction.

We find no reversible error in the case and the decree of the Circuit Court of Peoria County, dismissing the bill for want of equity, is hereby affirmed.

Affirmed.

[illegible]

[illegible]

but to [illegible]

by two [illegible]

that it was [illegible]

strongest [illegible]

Walker v. [illegible]

Appellate [illegible].

It is [illegible]

the case [illegible]

fraudulent [illegible]

the [illegible] in question, [illegible]

some future [illegible]

or trade [illegible]

what financial [illegible]

transaction.

[illegible]

the [illegible]

of equity, [illegible].

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

285 I.A. 598

BE IT REMEMBERED, that afterwards, to-wit: On APR 13 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GEN. NO. 9046. AGENDA NO. 16.

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A.D. 1936.

JOHN HODAK and
MARIE HODAK,
Plaintiffs-Appellees,

vs.

P. J. MARLAIRE,
Defendant-Appellant.

Appeal from County Court
Kankakee County.

WOLFE, J.

The appellees, John Hodak and Marie Hodak, started a suit in a Justice of Peace Court in Kankakee County, against P.J. Marlaire. The Justice tried the case and found the issues in favor of the plaintiff in the sum of $350.00. Judgment was entered for the same in favor of the plaintiff. Marlaire appealed the case to the County Court of Kankakee County. The case was tried before a jury who rendered a verdict in favor of the plaintiffs in the sum of $375.00. Judgment was entered by the trial court for this amount, and Marlaire brings the case to this court for review.

John Hodak and Marie Hodak, his wife, on May 15, 1934, entered into a written contract to purchase from P. J. Marlaire, a stock of groceries in the City of Kankakee, Illinois. They also rented a store building and residence from Marlaire. They were to get possession of the premises and the stock of goods on June 1, 1934.

GEM. MO. 2016.

JOHN HOGAN and
MARIE HOGAN,
Plaintiffs-Respondents,

vs.

P. J. MERLATTE,
Defendant-Appellant.

OPINION, J.

The appellees, John Hogan and [illegible]
in a Justice of the Peace Court in [illegible]
Merlatte. The jury tried the case [illegible]
favor of the plaintiff [illegible]
for the same in favor of the plaintiff. [illegible]
to the County Court of [illegible]
a jury who rendered a verdict [illegible]
of $275.00. Judgment [illegible]
and Merlatte brings the case to this court [illegible]

John Hogan and [illegible]
into a written contract [illegible]
properties in the City of [illegible]
store building and [illegible]
possession of [illegible]

The sale price for the store was $650.00, payable $200.00, in cash and the balance to be paid June 1, 1934. The $200.00 was paid. The Hodak's had lived in Iron River, Michigan. They arrived in Kankakee at the Marlaire place in the afternoon of June 1, 1934. Hodak shipped his furniture by truck, which arrived at the Marlaire place about 2.00 o'clock in the afternoon. The furniture was unloaded and placed in the garage. Marlaire had not moved out of the place. According to Hodak's version of the case, Marlaire said he could not move because a lady was living in his wife's property and they could not move until this party would give him possession of the other house. Hodak demanded possession and offered to give Marlaire a check for $450.00, if he would immediately vacate the premises, and turn the stock over to him. Marlaire refused to deliver possession of the premises at that time.

Hodak went to see a lawyer about the agreement and the next day went back and made a tender of the balance due on the contract, and made a demand for possession of the property. Marlaire told him he could not tell him just when he would be able to move out. Hodak told him that the deal was off and demanded the return of the $200.00. Marlaire refused to return the $200.00.

Hodak testified that he came to Knakakee, for the purpose of running a Studebaker Automobile Agency, and it was necessary for him to get started as quickly as possible; that he wanted a little store connected with a dwelling house, so that his father-in-law could be employed; that as soon as he learned definitely that he could not get possession of the Marlaire place, he set out to look for another location; that he soon purchased another store connected with a dwelling, in the city of Kankakee; that before he rented the place, he hired a dray and moved his furniture from the Marlaire place to a building owned by a Mr. Sprimont, where he stored his goods; that on May

The sale price [illegible]

and the balance [illegible]

Hodak's had lived [illegible]

at the Marfaire [illegible]

shipped his furniture [illegible]

about $.00 [illegible]

and placed in the [illegible]

According to Hodak's version of the [illegible]

move because [illegible] living in [illegible]

could not move until [illegible]

other house. Hodak demanded possession [illegible]

a check for $[illegible], [illegible]

and turn the check over to him. [illegible]

possession of [illegible] at that time.

Hodak went [illegible]

went back and made a tender of the [illegible]

made a demand for possession of the [illegible]

could not tell him [illegible]

told him that [illegible]

Marfaire refused to return the $[illegible].

Hodak testified [illegible]

running a [illegible] business [illegible]

to get started [illegible]

connected with a [illegible]

employed; that [illegible]

possession of [illegible]

location; that [illegible]

dwelling, in the city [illegible]

he hired a dry [illegible]

ing owned by [illegible]

15, he rented a garage from Mrs. Logan which she agreed to hold for him until June 1; that because of the trouble with Mr. Marlaire, he did not get over to Mrs. Logan's until the evening of June 1; that she had rented the garage that afternoon to another party; that he was unable to get a suitable garage to carry on his business until July 22, 1934; that in the meantime he had lost a sale of a Studebaker Dictator car, and a commission of $199.40; that in moving the furniture it was damaged. This suit was started to recover from Marlaire the $200.00, paid on the contract and also for the damage sustained by the Hodaks through the refusal of Marlaire to carry out his part of the contract.

At the conclusion of the evidence for the plaintiff, the defendant entered a motion for a directed verdict, and tendered an instruction for the same, but the trial court refused to give the instruction. It is now seriously insisted by the appellant that the trial court should have given the instruction, because the evidence shows that the plaintiffs' demand was for a greater amount than $500.00, namely, $547.00, which is greater than the jurisdictional amount of the Justice of the Peace.

The summons issued by the Justice of the Peace does not appear in either the abstract or the record. The transcript of the Justice shows that the demand of the plaintiff in the Justice Court was for $500.00, which was within the jurisdictional amount of the Justice of Peace. The Justice of Peace found the issues in favor of the plaintiff and assessed the damages at $350.00. The County Court, after the verdict of the jury, rendered judgment in favor of the plaintiff in the sum of $375.00. It is our opinion, that the County Court had jurisdiction to try this case and properly refused the defendant's instruction for a directed verdict.

15, he rented a [illegible]
for him until [illegible]
he did not [illegible]
that she had [illegible] the Gamble [illegible]
that he was unable to get a satisfa[illegible] [illegible] nearly 60 [illegible]
ness until July 3, 1934; that [illegible]
of a Studebaker dictator car, and [illegible]
moving the furniture it was damaged. [illegible]
recover from Marlatte the $100.00, [illegible]
for the damage sustained by the [illegible]
Marlatte to carry out his part of [illegible].

At the conclusion of the evidence [illegible]
fendant entered a motion for a directed verdict, [illegible]
instruction for the same, but the trial court [illegible]
instruction. It is now earnestly insisted [illegible]
the trial court should have given the [illegible]
evidence shows that the plaintiff [illegible]
amount than $50.00, namely, $587.00, which [illegible] than [illegible]
jurisdictional amount in the matter of [illegible].

The summons issued by the Justice of [illegible]
in either the contract or tort [illegible]
shows that the demand of the plaintiff [illegible]
for $500.00, which was within the jurisdiction [illegible]
Justice of peace. [illegible] of peace court [illegible]
of the plaintiff [illegible] the [illegible]
Court, after [illegible] the [illegible]
of the plaintiff [illegible]
the County Court [illegible] jurisdiction to [illegible]
refused the defendant [illegible]

The appellant argues that the verdict of the jury was against the weight of the evidence and the plaintiff did not prove his case. It is not disputed that the contract was entered into or that the defendant Marlaire agreed to deliver possession of the store and residence on June 1, 1934. It is not questioned but that the plaintiffs in good faith moved from their home in Michigan to Kankakee and were ready, able and willing to carry out their part of the contract and tendered to the defendant a check for the balance of the purchase price and demanded possession of the store, or that Marlaire refused to give them possession and stated his reasons therefor.

From a review of the evidence, it is our conclusion that the plaintiffs did everything that was required of them by their contract, but that the defendant refused to carry out his part of the contract and the plaintiffs were therefore justified in rescinding the contract and demanding the return of the $200.00, which they had paid. The questions of fact were for the jury to decide. They heard the witnesses and had the benefit of seeing and observing them upon the stand and were in a much better position to weigh the evidence than a court of review. They found the issues in favor of the plaintiff and we think the evidence fully sustains their finding.

The appellant objects to the Court's instruction which is as follows: "The jury are instructed that if one party to the contract is able and ready and offers to perform the agreement on his part, but is prevented from performing it by the other party, then such offer will be treated as excusing nonperformance by the party offering and he may recover damages, if any, sustained in consequence of not being allowed to perform on his part."

The [illegible] upon a [illegible]
the weight [illegible]
It is not [illegible]
defendant [illegible] to [illegible]
residence [illegible]
plaintiff [illegible]
damages [illegible] ready, [illegible]
of the contract [illegible] to the [illegible]
balance of [illegible] and [illegible]
on that [illegible] and [illegible]
reasons therefor.

From a review of the evidence, [illegible]
plaintiff did everything that was [illegible]
contract, but that the defendant [illegible]
the contract [illegible] plaintiff [illegible]
rescinding the [illegible] and demanding [illegible]
which they [illegible]. The questions [illegible]
to decide. [illegible] the testimony [illegible]
and observing [illegible] the [illegible]
position to [illegible] than [illegible]
issues in [illegible]
sustains [illegible].

The [illegible]
follows: [illegible] to
contract [illegible]
on his part, [illegible]
party, then [illegible]
by the party [illegible]
taking in consequence [illegible]

There is evidence in the record that the Hodak's were ready, able, and offered to perform their part of the contract, but were prevented from doing so because Marlaire could not give possession of the premises as agreed. The instruction properly stated the law.

We find no reversible error in this case and the judgment of the County Court of Kankakee County is hereby affirmed.

Affirmed.

There is evidence in the [illegible]

and offered to [illegible]

ed from doing so [illegible]

premises as [illegible]

We find no [illegible]

the County [illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9055

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of May, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff.

285 I.A. 599

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9055 Agenda No. 33

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

FEBRUARY TERM, A.D. 1936.

James H. Hooper, Complainant, Appellant vs. Marie Ellemund and Edmund Kelly, Defendants, Appellees.	)	Appeal from Circuit Court, DuPage County.

HUFFMAN - P. J.

Appellant prosecutes this appeal from the decree of the circuit Court of DuPage County dismissing his bill of complaint filed in aid of execution. Appellant states that this case has been tried three times, and that in each instance his bill was dismissed for want of equity.

A discussion of the facts involved will serve no useful purpose. The appellant assigns no errors relied upon for a reversal. Under such circumstances there is nothing presented to this court for review. It has long been the rule that a case submitted to a court of review for final decision without an assignment of errors, will be dismissed. Farmer's State Bank of Belvidere v. Meyers, 282 Ill. App. 549.

The appeal is therefore dismissed.

Appeal dismissed.

Gen. No. 9028

[illegible]

[illegible]

[illegible] TERM, [illegible], 1926.

James A. Hooper,	
[illegible]	
vs.	
Marie [illegible] Holly,	
Defendant, [illegible]	

HURDMAN - [illegible].

Appellant presents this [illegible] the circuit court of [illegible] County [illegible] of complaint filed in [illegible] this case has [illegible] his bill was dismissed [illegible].

A discussion of the facts involved [illegible] ful purpose. The [illegible] seeking no [illegible] a reversal. Under such circumstances there is nothing [illegible] to this court for review. It has long been [illegible] that [illegible] submitted to a court of review for [illegible] assignment of errors, will be dismissed. [illegible] of Belvidere v. Meyers, 280 Ill. App. 244.

The appeal is therefore dismissed.

Appeal dismissed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

7008

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of May, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff.

285 I.A. 599

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9008 Agenda No. 23

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1936

Leader Ice Cream Company, a Corporation,

Appellant

vs.

John Doy,

Appellee

Appeal from the Circuit Court of Lake County.

DOVE, J.

On August 27, 1934 this suit was instituted in the Circuit Court of Lake County. The first and second counts of the complaint were in trover and alleged that the plaintiff on April 15, 1931 was lawfully possessed of a Knight soda fountain, together with certain described mechanical refrigeration equipment which it lost and averred that the defendant came in possession thereof by finding and that he converted the same to his own use. The third count alleged that on April 15, 1931 the plaintiff and the defendant entered into a conditional sales contract by the terms of which said soda fountain and equipment were to remain the property of the plaintiff until the full contract price of $1200.00 was paid. It was then alleged that according to the contract the defendant agreed to purchase his ice cream requirements from the plaintiff and if he failed so to do or if the plaintiff should fear a removal, waste or diminution of the property or if the defendant attempted to sell the property that then the plaintiff should have the right to take immediate possession thereof. It was then averred that the defendant refused to buy his entire ice cream requirement of the plaintiff and that the plaintiff, fearing the diminution, waste or removal of the property, demanded a return thereof, which the defendant refused with the malicious intent to defraud and cheat the plaintiff. The defendant

Ser. No. [illegible]

Leader Ice Cr[illegible]
Corporation.

[illegible]

John Doe,

[illegible]

DOYE, J.

On [illegible]

Court of [illegible]
were in trover [illegible]
lawfully [illegible]
described [illegible]
that the [illegible]
converted [illegible]
April 1[illegible]
tional [illegible]
equipment [illegible]
full [illegible]
accordingly [illegible]
green [illegible]
if the [illegible]
property [illegible]
the plaintiff [illegible]
thereof. [illegible]
his entire [illegible]
plaintiff, [illegible]
demanded [illegible]
malicious intent [illegible]

filed an answer denying that the plaintiff was the owner of the property or entitled to possession of the same and denying that he, the defendant, ever converted the property to his own use. Upon the trial of the issues, the following special interrogatory was submitted to the jury: "Did the defendant at the time and place alleged in plaintiff's declaration convert and dispose of the goods and chattels set forth in said declaration to his own use with the malicious intention of cheating and defrauding the plaintiff of said chattels as alleged in plaintiff's declaration?" The jury returned a general verdict finding the defendant not guilty and answered the special interrogatory in the negative. The court rendered judgment upon the verdict and the plaintiff below brings the record to this court for review.

Appellant's statement, brief and argument is not prepared in accordance with our rules. Rule 9 of this court provides that the brief of appellant shall contain "the errors relied upon for a reversal." On page 5, at the conclusion of appellant's statement, counsel says there is no point raised on the pleadings but nowhere does there appear any statement of errors upon which appellant relies for a reversal of the judgment appealed from and for this reason the appeal will be dismissed. Farmers State Bank v. Meyers, 282 Ill. App. 549; Bender v. The Alton R. R. Co., 284 Ill. App. 419; 1 N. E. (2d) 108.

APPEAL DISMISSED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9036

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of May, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff.

285 I.A. 599[3]

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9036 Agenda No. 26

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1936

Ruth A. Bailey, Administrator De Bonis Non of the Estate of Lindy E. Bailey, deceased,

Appellee

vs.

Harvey Kyle,

Appellant.

Appeal from the Circuit Court of McHenry County.

DOVE, J.

On April 11, 1933 Lindy E. Bailey, a boy not quite five years of age, was struck and killed by an automobile being driven by the defendant on Route No. 23 at or near the northerly line of the city limits of Marengo. Less than a month thereafter this suit was instituted by his administrator to recover damages for his alleged wrongful death. The case has been submitted to two juries, resulting each time in a verdict for the defendant. The first verdict was set aside by the trial court and a second trial had. The verdict upon the second hearing was returned on July 7, 1934. Thereafter plaintiff filed her motion for a new trial, which was heard and sustained by the court on September 30, 1935. Upon the petition of the defendant, leave to appeal from this order was granted and the record is before this court for review.

It appears from the evidence that appellant, the defendant below, on the afternoon of April 11, 1933, was driving north in his Chevrolet sedan, along North State Street (which is a part of Route 23) in the City of Marengo going toward Harvard. Route No. 23 at this place is a concrete slab eighteen feet wide, with a black center line and dirt shoulders about six feet wide on each side of the slab

Gen. No. 9038

[illegible]

[illegible]

[illegible]

Ruth A. [illegible], [illegible]
Bonia Ion of [illegible]
E. Bailey, deceased,

[illegible]

vs.

Harvey Kyle,

[illegible]

DOVE, J.

[illegible] April 11, [illegible]
age, was struck [illegible]
defendant [illegible]
limits of Denver. [illegible]
stituted by his [illegible]
wrongful death. [illegible]
each time [illegible]
made by the trial [illegible]
the second [illegible]
filed her motion [illegible]
the court [illegible]
leave to [illegible]
this court for trial.

It appears from the [illegible]
below, on the afternoon of [illegible]
Chevrolet sedan, [illegible]
25) in the City of [illegible]
this place is a [illegible]
line and dirt shoulder [illegible]

and at the outer edge of each shoulder is a ditch. Eighth Street, the center line of which is the northerly city limit of Marengo is a gravel street and does not cross Route No. 23, but intersects it from the east at right angles. The parents of the deceased lived on the southeast corner of Route No. 23 or North State Street and Eighth Street, the front of their dwelling being about forty or fifty feet east of the eastern side of the concrete slab. The west side of their dwelling is about thirty feet south of the south side of the south line of Eighth Street. On the west side of Route No. 23 and almost opposite Eighth Street was an eighteen foot driveway leading from Route No. 23 into the farm home of Paul Stouvenite. This driveway was marked by two cement posts, one at the south side and one at the north side, both posts being on the west boundary line of Route 23. Attached to the south post was a three barbed wire fence running south for some distance, which enclosed a field or pasture. About two o'clock on the afternoon of April 11, 1933, Lindy E. Bailey, aged four years and eleven months, was playing with five year old Mary Stouvenite, a daughter of Paul Stouvenite, in this enclosed field or pasture just across the street from the Bailey home and on the west side of Route No. 23. Lindy was a strnng, healthy boy of fair intelligence with good hearing and eyesight.

Appellant was driving his Chevrolet sedan and was proceeding northward on Route No. 23, going toward Harvard. His wife sat in the front seat with him. The weather was clear, the sun was shining, the pavement dry and the roadway level and straight. No one who witnessed the accident testified, but the evidence tends to show that there was no other automobile proceeding along Route No. 23 in either direction or any traffic on North Eighth Street. After the accident, appellant's car stopped and he, accompanied by his wife, carried Lindy, who was then unconscious, to the home of his parents and then drove him with his mother and grandmother to a physician's office in Marengo and later to a hospital at Belvidere, where he died a few hours later, never having regained consciousness. Returning to Marengo from the hospital at Belvidere after Lindy's death, appellee, Mrs. Bailey, Louise Cantlin,

and at the outer [illegible]

the center line of [illegible]

a gravel street and [illegible]

from the east [illegible]

on the northeast [illegible]

Eighth Street, [illegible]

fifty feet east of [illegible]

side of [illegible]

of the south [illegible]

28 and almost [illegible]

leading from [illegible]

This driveway [illegible]

and one of [illegible]

line of [illegible]

wire fence [illegible]

or pasture. [illegible]

Hindy A. Bailey, [illegible]

with five year [illegible]

in this small [illegible]

Bailey [illegible]

healthy boy [illegible]

Appell [illegible]

northward on [illegible]

front seat [illegible]

pavement [illegible]

the accident [illegible]

no other [illegible]

or any traffic [illegible]

car stopped and [illegible]

then [illegible]

his mother [illegible]

to a hospital [illegible]

having regained [illegible]

at Point [illegible]

the grandmotherof Lindy, and Mrs. Kyle were riding in the rear seat of appellant's car and appellant was driving and Mrs. Cantlin testified that Mrs. Kyle, the wife of appellant, in speaking of the accident that afternoon said in a medium tone of voice that she had said "Harvey, look out, there is a child on the edge of the pavement." The inference from the record is that Mrs. Kyle in those words called the attention of her husband to the presence of Lindy before the accident. The record is silent whether appellant heard his wife say this either before the accident or when he was returning to Marengo from Belvidere and if Mrs. Kyle did say it and if appellant heard her, there is no evidence as to the position of appellant's car when it was said or how long it was before the accident. Mrs. Cantlin further testified that she and her daughter (appellee), a few minutes before Lindy was injured, were looking out af a west window of their home and saw Lindy and Mary playing in the field on the west side of the fence "right across the road opposite to where my daughter and I were standing." That she then sat down in a rocking chair close to the window and could see out and that the next thing she saw was appellant coming toward the house carrying Lindy in his arms, preceded by the wife of appellant, who said: "Have you a phone? We hit a boy, we hurt a boy." Appellee did not testify. Willis Jobe testified that while Lindy was at the physician's office in Marengo, appellant told him that he had had an accident and wished to report it to a state officer, that he had hit a child and in response to an inquiry as to how it happened, appellant said he didn't see the child, that the witness then asked appellant if he didn't have good brakes and appellant said "not very good" and in response to the witness' question whether he was driving fast, appellant said between thirty-five and forty miles per hour. Appellant denied these conversations. Paul Stouvenite testified that about two or two-fifteen o'clock in the afternoon of the day of the accident, he was dragging a field seventy or eighty rods west of the road and saw an automobile going north on Route No. 23. That he observed just the back end of the car along the edge of the house as the front had gone by. He did not know the kind of a car it was and did not know an accident

the grandmother Lindy, and Mrs. Lyle were riding in the rear seat
of appellant's car and appellant was driving. Mrs. Dorthis testified
that Mrs. Lyle, the wife of appellant, in speaking of the [illegible]
afternoon said in a medium tone of voice "[illegible] look out, there is a child on the side of the [illegible]
ence from the record in [illegible] attention of her husband to the [illegible]
The record is silent [illegible]
before the accident or when [illegible]
and if [illegible]
evidence as to the [illegible]
long it was before the [illegible]
ahe and her daughter [illegible]
were looking out of a [illegible]
playing in the field on the [illegible]
road opposite to [illegible]
sat down in a rocking chair [illegible]
that the next [illegible]
ing Lindy to [illegible]
"Have you [illegible]
testify. [illegible]
office in Memphis, [illegible]
wished to report [illegible]
in response to [illegible]
didn't see the [illegible]
didn't have good [illegible]
response to the witness' question [illegible]
said between thirty-five and forty [illegible]
these conversations. [illegible]
two-fifteen o'clock [illegible] accident. He was
dragging a field harrow or [illegible]
automobile going north on [illegible]
end of the car along the edge of the house on the [illegible] side by.
He did not know the kind of a car it was and did not know [illegible] accident

had happened until some time later. He testified he thought the car he saw was going thirty-five miles per hour. Upon the former trial he testified that he "judged this car to be going thirty or thirty-five miles an hour. He was not going fast." Mrs. Stouvenite testified that Lindy had been at her house playing in the morning and she saw him again in the afternoon about one o'clock. That about a quarter after one she learned from her daughter that he had gone home and didn't see him again that day. This witness also testified that when Lindy crossed the highway he was careful and would stop and look, and if there was a car coming he would wait until it passed.

Henry A. Nulle, the City Marshall of Marengo, testified as to the physical conditions at and near the intersection of North Eighth Street and Route No. 23, the presence there of culverts and sign posts on Route No. 23, the one on the east side showing the distance to Harvard and the one on the west side giving the name and population of Marengo. There was also a mail box north of the driveway going into the Stouvenite place and a stop sign on North Eighth Street. Mr. Nulle went to this location between three and three-thirty o'clock on the afternoon of the accident and informed Lindy's father, who was then working in a field some eighty or ninety feet east of the barn on their premises, of the accident. It was about this same time that appellant and Mrs. Bailey returned from the physician's office and appellant and his wife and Mr. and Mrs. Bailey all started for the hospital at Belvidere. Mr. Nulle then examined the pavement and noticed that a wheel track left the pavement on the east side about the center of Eighth Street intersection and gradually drew "over toward the shoulder line and about sixty some odd feet. I believe I saw a spot of blood on the shoulder. If I remember rightly there was one or two small spots, just a little bit north of Eighth Street on the east side of the pavement. The first blotches of blood I saw were probably two or three feet east of the edge of the pavement about fifteen feet north of Eighth Street. I noticed the tread of the tires of the automobile on the shoulder leading up to where the automobile had gone. I

had happened until some [illegible] later.

car he saw was going [illegible]

trial he [illegible]

thirty-five [illegible]

testified [illegible]

and she saw [illegible]

about [illegible]

gone home [illegible]

testified [illegible]

stop and look [illegible]

passed.

[illegible]

the [illegible]

street [illegible]

posts [illegible]

to [illegible]

of [illegible]

into [illegible]

it. While [illegible]

on the [illegible]

then working [illegible]

on their [illegible]

appellant [illegible]

appellant [illegible]

negligent [illegible]

that a wheel [illegible]

of eighth [illegible]

should [illegible]

of blood [illegible]

water [illegible]

of the [illegible]

or three [illegible]

of eighth street. [illegible]

on the south [illegible]

examined the pavement for tire burns and didn't find any until where the car came to a complete stop. The mark showed on the shoulder not on the concrete and four or five feet south of that was a pool of blood about the size of an ordinary sauce dish." This witness also testified that he saw appellant's car and that the glass in the left hand headlight was broken. Another witness testified that he was with Mr. Nulle when Nulle visited the scene of the accident a second time, which was about five o'clock in the evening of the day Lindy was killed and he testified that he observed blood ~~only~~ along the east line of the pavement north of Eighth Street and that it "seemed to be a sort of continuous line of trickle there on the pavement."

The foregoing is a fair resume of the testimony offered on behalf of the plaintiff below. For the defendant his sons testified to the fact that a week or ten days prior to April 11, 1933 they put new shoes and brake lining on appellant's car and that just before and just after the accident the brakes worked good. As stated, appellant denied that he said to Willis Jobe on the afternoon of the accident that his brakes were not very good and that at the time of the accident he was driving between thirty-five and forty miles an hour and did not see appellee's intestate. There was other evidence to the effect that from the Bailey property line to the Stouvenite property line the width of Route No. 23 was sixty-five feet and that in front of the Bailey home on the east side of Route No. 23 there are eleven trees, shown in the several photographs which were in evidence and which we have examined. Appellant also offered in evidence the result of some tests made with four children between the ages of four and five and one-half years to the effect that such a child could run twelve and one-half feet per second. Appellant also offered in evidence the testimony of appellee before the coroner and her testimony at the first trial and the testimony of William E. Bailey, the father of Lindy, who testified at the first trial, but who has since died. The trial court sustained objections to this offered evidence and none of it was permitted to be read to the

jury.

Counsel for appellant insist that it was error for the trial court to exclude this proffered testimony and erred in refusing to instruct the jury to find the defendant not guilty at the close of all the evidence and erred in granting a new trial. Counsel for appellee insists that the rulings of the trial court with reference to the evidence were correct, that the verdict of the jury finding the defendant not guilty was manifestly against the weight of the evidence, that certain instructions were erroneous and that the doctrine of res ipsa loquitur applied and the burden was cast upon defendant to show that he was not negligent, which he failed to do.

In the view we take of this record, it becomes unnecessary for us to pass upon the rulings of the trial court with reference to the proffered testimony of appellee or her deceased husband. There is nothing in the record which advises this court of the reasons which prompted the trial court to set aside the verdict and award the plaintiff a new trial and this should have been done. Gavin v. Keter, 278 Ill. App. 308. This court recognizes the discretion vested in a trial court in ruling upon such motions, Lynn Admr.,etc. v. Haff, Gen. No. 9044, opinion therein this day filed, Gavin v. Keter, supra, and is reluctant to substitute its judgment for that of the trial judge. In this case, however, we believe the issues of fact were fairly submitted to the jury under substantially proper instructions and inasmuch as two juries have found the issues the same way, we believe, in the absence of any errors in the court's rulings upon the admission or rejection of evidence prejudicial to appellee, that the last verdict which again found the defendant not guilty should be permitted to stand.

The first count of the amended declaration alleged that appellee's intestate was proceeding across Route No. 23 from the yard or field of the Stouvenite home and while on the cement portion thereof the defendant so carelessly drove and managed his automobile that it struck appellee's intestate, knocked him down and he was dragged for a long distance and run over by said automobile. The second count

charged that appellant was approaching the north city limits of the City of Marengo at a greater speed than was reasonable and proper, that the decedent had proceeded to cross the cemented portion of Route No. 23 and had reached a part about the center of the same at the time of the collision. The defendant plead the general issue. Upon the issue thus made, it devolved upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of the negligence charged and that such negligence was the proximate cause of the death of Lindy E. Bailey. Counsel for appellee recognized this during the trial of the cause, as it appears from the record that the trial court discussed with the attorneys the proposed instructions which he intended to give, and during the course of that discussion one of appellee's counsel stated in substance to the court that the question whether or not appellant was running his car at a speed that was reasonable, having regard to the surrounding conditions and the rights of persons using the public highway and whether under all the conditions Lindy came onto the pavement or to the pavement and whether appellant could have seen him were all questions of fact for the jury to pass upon. The portion of the court's instruction to which appellee complains is as follows: "The fact that the east and west road entering into Route 23 at or near the place of accident had a stop sign on it did not relieve Harvey Kyle from looking for vehicles, pedestrians or stock, if any, going along such east and west road toward Route 23, and if you believe that he did in that regard what a reasonably prudent person in the exercise of ordinary care would do under like or similar circumstances, then he is not negligent in so looking". Counsel's criticism of this instruction is that it assumes there were vehicles, pedestrians and stock going along North Eighth Street toward Route 23 and that the effect of the instruction was to divert the attention of the jury and excuse the defendant from liability. It is true that there is no evidence that at or about the time of the accident there were any pedestrians, stock or vehicles going along North Eighth Street toward Route 23, but the instruction does not tell

the jury there were, nor does it assume that there were. Furthermore this case was tried under the provisions of the Civil Practice Act prior to the Amendment of 1935 and the record discloses that the instructions were fully discussed by the Court with counsel after the evidence was concluded and before the instructions were read to the jury, and no objection was made by counsel for appellee to the instructions which were finally given by the Court to the jury. Counsel for appellee are therefore in no position to insist at this time that this instruction is erroneous. Zorger v. Prudential Ins. Co., 282 Ill. App. 444; The People v. Pizzo, 362 Ill. 194.

Negligence has been defined as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a prudent and reasonable man would not do. The jury were so told by the court in the instructions in this case and were told the substance of the charge of negligence contained in the declaration and were advised that the burden of proving the defendant guilty of such negligence rested upon the plaintiff. The jury, by their verdict, found from the evidence that the defendant was not guilty of any negligence. To find the defendant either guilty or not guilty was, under our system of jurisprudence, the function of the jury and the fact that the trial court had the case been submitted to him for determination would have found otherwise or the fact that had he been acting as a juror instead of a judge, he would have refused his assent to the finding of not ~~guil~~ guilty, it by no means follows that the trial court should have granted a new trial. If such was the law, then no finding of the jury that did not meet the trial court's view of the facts would ever be accepted and the jury would become an utterly useless part of the trial. Schneesweisz v. Ill. Cen. R. R. Co., 196 Ill. App. 248.

It is apparent from the discussions of the trial court and counsel with reference to the instructions that it was not contended by counsel for appellee in the trial court that the doctrine of res ipsa loquitur was applicable to the facts as they are disclosed by

this record. There have been two trials of this case and in the record we are reviewing there are no errors of law prejudicial to appellee with respect to the introduction of evidence. The jury was fully instructed as to the law and no reversible error appears in connection with the instructions. There is nothing to indicate that the jury arrived at their verdict through passion, prejudice or by any means other than a consideration of the law and the evidence. We have read this record with care. There is no direct evidence as to just what occurred immediately before and at the time of this unfortunate accident, but we are clearly of the opinion that the verdict of the jury is sustained by the evidence, at least it is not so manifestly against the weight of the evidence as should require the case to again be submitted to another jury. The order setting aside the verdict of the jury and awarding the plaintiff a new trial is reversed and this cause is remanded with directions to the trial court to render judgment on the verdict in favor of the defendant and against the plaintiff in bar of the action and for the defendant and against the plaintiff as administrator, etc. for costs of suit.

REVERSED AND REMANDED WITH DIRECTIONS.

this record. There have been the trial [illegible]
record we are reviewing there can be errors [illegible]
appeals with respect to the introduction of [illegible]
was fully instructed as to the law [illegible]
in connection with the [illegible]
that the jury [illegible]
or by any means [illegible]
evidence. [illegible]
evidence as to [illegible]
of this [illegible]
that the verdict [illegible]
it is not [illegible]
require the [illegible]
setting aside the [illegible]
a new trial [illegible]
to the trial [illegible]
the defendant [illegible]
the defendant [illegible]
costs of suit.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9044

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of May, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff.

285 I.A. 599

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9044 Agenda No. 28.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1936.

William J. Lynn, Administrator of the Estate of Raymond J. Lynn, deceased,
Plaintiff-Appellee

vs.

Bert Haff,
Defendant-Appellant

Appeal from Order Granting Motion for New Trial, Circuit Court of Kane County.

WOLFE- J.

William J. Lynn, as Administrator of the Estate of Raymond J. Lynn, deceased, filed a suit in the Circuit Court of Kane County, against Bert Haff, for damages sustained by the death of the plaintiff intestate, Raymond J. Lynn. The declaration was filed January 22, 1932, and charges that through the negligent operation of the automobile, owned and driven by the defendant, Bert Haff, the plaintiff's intestate was killed.

The original declaration consisted of 6 counts, but the second and sixth counts were withdrawn from consideration of the jury during the trial of the case. The first count charges the defendant with general carelessness in the negligent operation of his car, from which a collision resulted between his car and the Haff car in which the plaintiff intestate was injured and later died. The third count charges that the defendant drove his car at a high and reckless rate of speed to-wit -- thirty-five miles an hour in violation of the Statute. The fourth count charges the defendant with the negligent violation of the statute in regard to the right-of-way. The fifth count charges that the defendant was negligently driving at a high, dangerous and excessive rate of speed contrary to the statute, etc., To this declaration, the defendant interposed the plea of the general issue. Trial was had before a jury who found the issues in favor of the defendant. The trial court entered a judgment on the verdict in favor of

Gen. No. [illegible]044

[illegible]

[illegible], D. C.

William [illegible], [illegible] testator
of the Estate of [illegible],
Lynn, deceased,
Plaintiff-appellee

vs.

Bert Taft,
Defendant-[illegible]

MOLER- J.

William [illegible] Lynn, [illegible]

J. Lynn, deceased, [illegible]
against Bert Taft, [illegible]
tiff intestate, [illegible]
26, 1922, and [illegible]
automobile, [illegible]
plaintiff's intestate [illegible].

The original [illegible]
and sixth counts were [illegible]
the trial of the case. [illegible]
general [illegible]
which a collision [illegible]
the plaintiff intestate [illegible]
emerges [illegible]
of speed [illegible]
Statute. [illegible]
violation of [illegible]
count charges that [illegible]
dangerous and excessive [illegible]
To this declaration, [illegible]
issue. Trial was [illegible]
the defendant. [illegible]

the defendant and dismissed the suit at plaintiff's costs. The judgment was entered on May 9, 1934.

On May 18, 1934, the plaintiff made a motion to vacate the judgment and for a new trial. The arguments on this motion were heard on July 6, 1934. The court took this motion under advisement and on November 1, 1935, sustained the motion and granted a new trial giving as his reason therefore the following: "The motion for a new trial is granted. It appears that the defendant offered no proof and the case stands on the testimony of the plaintiff, which testimony shows a liability on the part of the defendant; and because the verdict is against the weight of the evidence."

The accident happened in the City of Aurora at or near the intersection of Prairie Street and Woodlawn Avenue, which is a closely built up residential section of said city. The appellant insists that the trial court erred and abused his judicial discretion in granting a new trial. It is his contention that the evidence was not sufficient to sustain a verdict for the plaintiff, even if the plaintiff had been successful in the trial court, and as the jury had passed on the evidence and found in favor of the defendant, he is entitled to the benefit of this verdict. The trial court gave as his reasons for setting the verdict aside that there was some evidence of negligence on the part of the defendant and as the defendant did not introduce any evidence to contradict the proof of the plaintiff, there was sufficient evidence that the jury should have found in favor of the plaintiff. It would serve no useful purpose for us to recite the evidence in this case. The matter of granting a new trial is largely discretionary with the trial court. After examining the whole record, it is our conclusion that the trial court did not abuse that discretion and did not err in granting a new trial.

The order of the Circuit Court of Kane County, in granting a new trial is hereby affirmed.

Affirmed.

the defendant and dismissed the [illegible]. [illegible]
judgment was entered on [illegible], 1924.

On May 12, 1924, the [illegible]
judgment and for a new trial. [illegible]
heard on July 6, 1924. [illegible]
and on November 1, 19[illegible], [illegible]
trial giving as his reason [illegible]
a new trial [illegible] granted. [illegible]
proof and the [illegible]
testimony [illegible] liability on the part of [illegible]
cause the verdict is [illegible]

The [illegible] judgment [illegible]
interposed in [illegible]
closely built up [illegible]
indicate that the [illegible]
tion in granting [illegible]
was not sufficient to [illegible]
the plaintiff had [illegible]
jury had passed on the [illegible]
be entitled to the benefit of [illegible]
as his reason for [illegible]
evidence of negligence [illegible]
fendant did not [illegible]
plaintiff, there was sufficient [illegible]
found in favor of the [illegible]
for us to reweigh the evidence [illegible]
a new trial in [illegible]
examining the whole record, [illegible]
did not abuse that discretion [illegible]

The order [illegible] trial is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

Abstract
Opinion filed Nov. 16, 1935

PUBLISHED IN ABSTRACT

George Fisher, as Administrator of the Estate of Blanch Hopson Fisher, Deceased, Plantiff-Appellant, v. Russell Wittler. Defendant-Appellee.

285 I.A. 600

Appeal from Circuit Court of Adams County.

VACATION AFTER OCTOBER TERM, A. D. 1935.

Gen. No. 8936 **Agenda No. 19**

PER CURIAM:

George E. Fisher, administrator of the estate of Blanch Hopson Fisher, deceased, brought suit against Russell Wittler, in the Circuit Court of Adams County, to recover damages resulting from the death of said Blanch Hopson Fisher, alleged to have been caused by the negligence of said Russell Wittler.

The cause was submitted to a jury who by their verdict found the defendant not guilty. After overruling a motion for a new trial and a motion in arrest of judgment, the following judgment was entered:

"And now comes the defendant by his attorneys and prays judgment on the verdict of the jury herein. It is therefore considered and adjudged by the court that the defendant have and recover of and from the plaintiff his costs and charges in this behalf expended and have execution therefor."

This is not a final judgment and does not dispose of the case on its merits. A final judgment is one which fully decides and finally disposes of the rights of the parties. *Smith* v. *Bunge,* 358 Ill. 229. Puterbaugh Common Law Pl. & Pr. Sec. 1096. *Town of Magnolia* v. *Kays,* 200 App. 122.

This Court can only entertain an appeal from a final judgment entered in the cause, except interlocutory orders concerning injunctions and receivers. Section 77, Civil Practice Act, Ill. State Bar Stats. 1935, Chap. 110, Par. 205.

The record filed is certified by the Circuit Clerk as a full, true and complete transcript of the record and files in said cause. No appeal being authorized by the Provisions of the Civil Practice Act, except from a final judgment, and no final judgment having been entered in said cause, the Appellate Court of the Third District is without jurisdiction to hear and determine

the matters involved in said cause or to enter any order other than one dismissing the appeal form want of jurisdiction. It is therefore ordered that said appeal be dismissed for want of jurisdiction at the costs of appellant.

Affirmed.

(Two pages in original opinion.)

Abstract
Opinion filed Jan 7, 1936.

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PUBLISHED IN ABSTRACT

George Fisher, as Administrator of the Estate of Blanch Hopson Fisher, Deceased, Plaintiff-Appellant, v. Russell Wittler. Defendant-Appellee.

Appeal from Circuit Court of Adams County.

JANUARY TERM, A. D. 1936. 285 I.A. 600

Gen. No. 8936 **Agenda No. 19**

PER CURIAM:

And now comes on for consideration the Petition for a Rehearing of said cause filed by Appellant herein and his motion for an order vacating the order of dismissal entered in said cause on November 16, 1935, and to reinstate said cause, and permit Appellant to suggest a diminution of the record and to file as of date July 2, 1935, the date of the filing of the original transcript of the record in said cause, an amended and supplemental transcript of record of the proceedings in said cause had in the Circuit Court of Adams County, with an abstract thereof, and also including an order of said court amending its judgment entered on January 21, 1935, nunc pro tunc as of said date.

And it appearing that the jury returned a verdict of not guilty in favor of the defendant in said cause and that the court entered judgment thereon in bar of said action and that owing to a misprison of the clerk of said court in writing up the record in said cause no final judgment was entered.

It further appearing that an appeal was duly perfected in said cause by appellant from said judgment and that a transcript of the record duly certified under the hand of the clerk and the seal of said court was filed in this Court and although an order of dismissal of said appeal was entered in said cause on November 16, 1935, the court has jurisdiction of said cause, and it further appearing that the circuit court of Adams County, upon due notice to appellee, amended said judgment to conform with the judgment of said court entered on January 21, 1935.

And in furtherance of justice and in order to give appellant an opportunity to have said cause reviewed by an appellate tribunal the court finds that the prayer of said petition for rehearing and said motion should

be granted. *Gage* v. *Schmidt, et al.,* 104 Ill. 106; *Supreme Lodge Knights of Honor* v. *Dalberg,* 138 Ill. 508; *Anderson* v. *Karstens,* 297 Ill. 76; *Cosgrove* v. *Highway Commissioners of the Town of Rockville,* 281 Ill.. App. 406.

It is therefore ordered that the petition for rehearing be granted and that the order of dismissal of said appeal entered herein on November 16, 1935, is therefore vacated and set aside and said cause reinstated and appellant is granted leave to file instanter, nunc pro tunc, as of date July 2, 1935, the date of the filing of the original transcript of record, an amended and supplemental transcript of the proceedings in said cause in the circuit court of Adams County had on November 23, 1935, duly certified by the clerk of said court, including the order entered by said court on that day amending its judgment entered on January 21, 1935, nunc pro tunc, as of said date, and the said judgment as amended and an abstract of said amended and supplemental transcript of record, and that this cause be taken for decision upon its merits in accordance with the order of submission entered at the October Term, 1935, of this Court.

(Two pages in original opinion.)

14 (65855)

Abstract .80 ex

Opinion filed April 7, 1936
Rehearing denied May 27, 1936

PUBLISHED IN ABSTRACT

Mary Coultis, Appellee, v. Illinois Terminal Company, a Corporation, Appellant.

Appeal from the Circuit Court of DeWitt County.

JANUARY TERM, A. D. 1936.

Gen. No. 8938 **Agenda No. 1**

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal from a judgment of the circuit court of DeWitt county for $3000.00, entered on March 8, 1935, in favor of Mary Coultis, appellee, and against the Illinois Terminal Company, a corporation, appellant. The verdict of the jury was for $4500.00, but on the hearing of the motion for a new trial the court required the plaintiff to remit the sum of $1500.00 on condition that a new trial be not granted.

The case was tried upon the first and second amended counts of the declaration, to which a plea of the general issue was interposed after a demurrer had been overruled to said counts. A demurrer was also filed to the third amended count of the declaration, which was sustained by the court.

The first amended count alleged that the defendant owned and operated an electric railroad, extending from Decatur, Illinois, to and through the city of Bloomington, for the carrying of passengers for reward; that the plaintiff became a passenger for reward at Clinton to be carried to Bloomington, Illinois, upon one of the cars of the defendant; that it became the duty of the defendant to furnish safe passage and provide safe means of egress from the car upon her arrival at Bloomington and to carefully assist the plaintiff, by the agents and servants of defendant, in alighting from said car and to carefully furnish to the plaintiff the necessary steps and other appliances and means of egress.

Plaintiff avers that, wholly regardless of its duty, it did not furnish safe passage for her and did not provide a safe means of egress for her from said car upon its arrival in the city of Bloomington and did not carefully furnish to plaintiff the necessary steps and means of egress for her to alight from said car upon the street in Bloomington; and avers that upon her arrival in

Bloomington, while attempting to alight from said car and while in the exercise of due care and caution for her own safety, the conductor of said car, who was the agent of defendant, carelessly and negligently took hold of plaintiff's arm and so carelessly and negligently directed and guided the plaintiff that she stepped upon the edge of a landing stool which was carelessly and negligently placed there by the conductor, that it turned over and slipped from under the foot of plaintiff, by means whereof the plaintiff fell and was thereby thrown upon the pavement and upon said landing stool with great force and was permanently injured and her hip broken, and she was sick and sore and prevented from transacting and attending to her business.

The second count alleges that it was the duty of defendant to safely and carefully assist the plaintiff to leave said car upon its arrival at Bloomington and safely furnish a means of leaving said car and alighting upon the street; it further avers that upon arrival at Bloomington she attempted to leave and alight from said car, when the conductor, wholly regardless of his duty and the duty of the defendant, negligently and carelessly took the plaintiff by the arm and led and guided her from said car so that, in attempting to step from the stairway leading from the platform of the car to the surface of the street, the plaintiff was caused to so step upon the receiving platform or step that the defendant had negligently placed there that said step turned under her foot and caused her to fall and she was injured.

Appellant filed a Notice of Appeal with proof of service thereof upon the appellee on March 26, 1935, which informed appellee that it appealed to the Appellate Court of the Third District of the State of Illinois, from a judgment against it and in favor of appellee, Mary Coultis, rendered in the circuit court of DeWitt County, Illinois, on the 8th day of March, 1935, for the sum of $3000.00 and costs of suit, and stated that appellant desires that the judgment of the circuit court may be reversed or reversed and remanded for a new trial.

Among the errors complained of for reversal of the judgment is that the verdict of the jury is clearly against the manifest weight of the evidence.

We have carefully read the record in this case. Mrs. Coultis, appellee, testified that she was not the first person to get off of the car when it arrived at Bloomington. Some one was before her, and as this party

stepped down the conductor took her right hand and as she put her foot down she happened to glance at the conductor and his head was turned the other way, and his motion, in taking her hand and turning, made her so she missed that step a little; that her foot touched the step and the stool flopped over and she fell.

Mr. McNeer, a witness called on behalf of appellee, testified that he was present at the time of the accident, that some five or six persons got off the car ahead of appellee, then she came down the steps. She missed the bottom step,—what I mean is the footboard,—and fell. On cross-examination he testified that she stepped on the bottom step and then on the box and the box turned over. This is all of the evidence on behalf of appellee as to the occurrence.

On behalf of appellant J. M. Ruggles, the conductor, testified that when the train stopped at Bloomington he got off of the car and placed the loading box on the pavement; that he remembered Mrs. Coultis getting off of the car, and as she came down the steps he reached up and took her arm with his right hand and her wrist with his left hand, and she came down the steps and put her foot squarely on the box, and that he held onto her until she was firmly on the pavement, and then turned to catch another, and as she stepped off of the box I heard her scream, and turned around and she was lying on her back.

In addition to the conductor there were at least four other persons who lived at various adjoining towns and who were present, awaiting the arrival of thetrain, and were in the vicinity of the step from which appellee alighted and who testified that appellee came down the steps and stepped on the landing stool and off onto the pavement, and did not fall until after she was on the pavement and all of whom testified that the landing stool remained upright and did not turn over, and all of whom testified to the fact that the conductor assisted appellee to alight.

Appellant also insists that plaintiff's counsel committed reversible error in his conduct and remarks, during the course of the trial, which were not cured by the rulings of the court.

Every person is entitled to a fair and impartial trial on the law and evidence in the case, uninfluenced by any improper conduct of the attorneys or any other person connected with the trial.

Appellant calls our attention to some of the occurrences and, while the question is not properly saved

in some instances, we feel that the conduct of counsel as disclosed by the record should not go unnoticed.

Almost all of the witnesses of appellant testified that one of the ankles of Mrs. Coultis was taped, and that they saw the bandage or tape, which was controverted by appellee. The evident purpose of this inquiry was to establish that Mrs. Coultis had a weak ankle. Appellee's counsel in cross-examination of the witness, Mrs. George Coby, referred to in the abstract and argument of appellant as Mrs. George Coveny, in regard to the tape on the ankle of Mrs. George Coultis, asked the witness when she saw the tape, and she replied, when Mrs. Coultis was coming down the steps of the car and when they carried her to that bench, and then she testified that there was no other people on the bench at that time, when the attorney for appellee said: "Real funny, isn't it?" In answer to the question as to whether the witness saw the feet of appellee at that time, the witness replied, that her head was to the southwest so her feet were to the northeast, when the attorney said: "You reason well." And again, after questioning the witness as to whether she watched the plaintiff and the conductor after Mrs. Coultis fell, and to which the answer was she did, the attorney said to the witness: "Your view took in considerable territory?"

Appellant also complained of the argument of L. O. Williams, one of the counsel for appellee, who in his argument to the jury said: "In my judgment the witnesses who testified to that, referring to the bandage, have written on their souls to-day the verdict of black perjury, and no railroad company and no agent of any railroad company is justified in going to the extent of building up a defense in order to save themselves a few dollars." The court overruled the objection to this statement of attorney of appellee.

The remarks of counsel to the witness on cross-examination were all uncalled for and were evidently made for the purpose of discrediting the witnesses in the minds of the jury, and in a case where an elderly lady is plaintiff and the defendant is a railroad corporation it is very apt to have some influence upon the jury even though the court sustained an objection thereto.

The effect of the argument quoted, which the court permitted to stand, could only be very detrimental to

the defendant. It is error for an attorney in the argument of a case to state to the jury what his personal judgment is.

It is the province of the jury to determine from the evidence the credibility of the witnesses, and an attorney subjects himself to censure when he assumes to tell the jury what his personal judgment is as to the credibility of the witnesses. Neither had the attorney the right to charge that the railroad company or its agents built up a defense in order to save a few dollars.

Counsel in their argument to the jury are allowed the most liberal freedom of speech consistent with fairness and justice, but they should not use extravagant and intemperate language abusive of the parties. They can call the attention of the jury to any fact shown by the evidence and draw deductions therefrom, but are not authorized to give to the jury their personal judgment on any question as was done in this case. The jury must be left free to decide the case on the law and the evidence uninfluenced by any personal opinion of counsel.

Our attention is also called to the statement made by appellee in her brief wherein it is charged that the statement in the brief of appellant is so false, misleading and unfair as to make it necessary for appellee to make an extended statement in her brief.

So far as we are able to ascertain from the statement of appellee and the record in the case, appellant did not make a false, misleading and unfair statement of the facts in the case.

Appellee in her cross appeal insists that the court erred in requiring her to enter a remittitur of $1500.00 from the verdict of the jury. The judgment from which the cross appeal of appellee was taken was as follows:

This cause comes on to be heard on the motion for a new trial heretofore filed by the defendant. After the argument of counsel and due deliberation of the court it is ordered by the court that a remittitur for the sum of $1500.00 be filed, and the defendant is given until March 8, 1935, to enter said remittitur. It is further ordered by the court that if the plaintiff fails to enter such remittitur then a new trial will be granted.

This is not a final judgment and no appeal will lie therefrom. Sec. 77, Civil Practice Act.

It is also insisted by appellee that the court erred in holding that the third amended count of the declara-

tion does not state a good cause of action. When the court sustained the demurrer to said count appellee elected to abide by her demurrer, but the court did not enter judgment thereon. This question is not presented for review.

Appellee further insists that many questions raised by appellant are not properly before the court for the reason that no Notice of Appeal was served from the rulings or judgment of the court upon many questions.

Appellant filed a Notice of Appeal with proof of service upon appellee informing appellee that it appealed to the Appellate Court of the Third District from a judgment against it and in favor of appellee, rendered in the circuit court of DeWitt County, Illinois, on the 8th day of March, 1935, for the sum of $3000.00 and costs of suit, and stating that appellant desires that the judgment be reversed, or reversed and remanded.

This was an appeal from that judgment and brings up for review all of the questions properly raised in the lower court and is in exact keeping with Rule 33 of the Supreme Court.

It is true that under this rule one can appeal from a part only of the judgment, but if this is done the part appealed from must be specified.

Appellee contends that, since the enactment of the Civil Practice Act, assignment of errors is abolished and is no longer necessary or proper. That in our practice the Notice of Appeal takes the place of the assignment of errors under the old practice act.

There is no merit in this contention. The Notice of Appeal is the means by which an appeal is taken. Sec. 74-76 (1), (2), and has no other purpose and does not take the place of the assignment of errors under the old practice act. While assignment of errors as known under our former practice it is unknown under the Civil Practice Act, yet, if one examines Rule 1 of this court, as amended, and Rule 36 of the Supreme Court, as amended, he will find the following language under subdivision (2):

"No assignment of errors or cross-errors shall be necessary, except the statement in the brief, at the conclusion of the statement of the case, of the errors relied upon for reversal, as required in Rule 39." Rule 9, as amended, of this court and Rule 39 of the Supreme Court, as amended, provide:

"The concluding subdivision of the statement of the case shall be a brief statement of the errors or

cross-errors relied upon for a reversal or of the cross-errors submitted by an appellee not prosecuting a cross appeal." It is plain that assignment of errors are necessary under the Civil Practice Act.

We are of opinion that the verdict of the jury is clearly against the manifest weight of the evidence, and the judgment is therefore reversed and the cause remanded to the Circuit Court of De Witt County for a new trial.

Reversed and Remanded.

(Eight pages in original opinion)

(2593—12)

Abstract.
Opinion filed - April 17 - 1936

.402

154

PUBLISHED IN ABSTRACT

Arthur Burton, Plaintiff-Appellee, v. W. A. Doss, Defendant-Appellant.

Appeal from County Court, Piatt County.

JANUARY TERM, A. D. 1936. 285 I.A. 600[3]

Gen. No. 8943 **Agenda No. 7**

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal by W. A. Doss, appellant, from a judgment in a replevin suit tried in the county court of Piatt county, Illinois, on appeal from a Justice Court, over the right of possession of an automobile. The officer serving the writ was unable to find the automobile and the defendant failed to deliver the same to the officer. The jury by their verdict found the car to be the property of the plaintiff, Arthur Burton, and also found by their verdict that the car was of the value of forty dollars, upon which verdict the court entered a judgment after overruling a motion and amended motion for a new trial containing more than twenty reasons for the granting of the same.

It appears from the evidence that appellee, Arthur Burton, had purchased a Dodge truck, which was financed by the Allied Finance Company at Urbana, Illinois. There was still due on the truck the sum of $177.00. The Finance Company had agreed to take $140.00 for the paper and Doss paid the Finance Co. the $140.00, and took an assignment of the conditional sales contract held by the Finance Company and the note.

W. A. Doss had a yellow Buick Roadster automobile. The Dodge truck was still owned by Burton and was in his possession when he met Mr. Doss one day on the Court House steps in Monticello and asked him what he wanted for that old Buick. Doss replied he would take the truck and give him the Buick and call it square. He said he would call up Elbert, a brother of W. A. Doss, and tell him to let Burton have the Buick car, which was in the garage of Elbert, and for Burton to tell his office girls to have the title fixed up. Burton went to the garage of Elbert Doss and told him about it, and Elbert replied that it was all right.

He had the car in his possession about two weeks, when Mr. Doss sent two men after it and Mr. Doss took it away from him. Doss then had both the truck and the Buick car. Burton served a demand upon Doss, but Doss refused to give up the Buick car, Doss claiming that Burton expressly warranted the truck except as to the drive shaft, and that he had to pay out money for other necessary repairs to the truck.

After taking the Buick car Doss foreclosed against the truck by virtue of what he calls the title retaining note, which had been assigned to him, at which sale he purchased the truck for less than the amount due on the note, $177.00, which he had previously purchased from the Finance Company for $140.00.

Appellant assigns twenty-one reasons for a reversal of the judgment. His first contention is that the major issue is one of law, and then contends that appellee, before he delivered the truck to appellant, did not attempt to do anything about any certificate of title and insists that by virtue of clause 7, Section 256, Chapter 121, Smith-Hurd Statutes 1933, appellee was required to obtain a certificate of title and in making a sale he should assign the same to the purchaser with a warranty of title on the certificate.

We are of opinion that there is no merit in this contention as the record shows that Doss told one of his office girls to fix this man up a title, and she replied, we have to send it to Springfield before we can give him a title, so she fixed it up and sent in to Springfield to have it changed. Appellee also testified that he went home and went over and got his assignment to give him the title to the truck and they said it would have to go to Springfield.

Complaint is also made of the instructions given to the jury on behalf of appellee. The case was tried prior to the amendment of Section 67 of the Civil Practice Act in July, 1935, and there is nothing in the record that discloses that appellant made any suggestions either orally or in writing before the argument of the case as to the instructions complained of, and we are without authority to review any of such instructions.

Appellant also complains that the court erred in refusing to give his instructions, four and six. The court did not err in refusing to give appellants offered instruction number four.

Instruction number six complained of is not properly before the court for determination as no error is assigned on account of the action of the court in refusing to give the same.

Instruction number six is as follows and was offered by Mr. Doss, after the jury had been instructed by the court.

"Did the plaintiff, Burton, at any time tender or give to W. A. Doss any certificate of title showing ownership of said Dodge Truck to be in the plaintiff, Burton." "Answer yes or no."

Under the provisions of Section 65 of the Civil Practice Act, in any case in which a jury renders a general verdict, they can be required to find specially upon any material question of fact which shall be stated to them in writing, and which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury.

We are of opinion that the court did not err in refusing to submit this question to the jury. In the first place the record fails to show it was submitted to the adverse party before the commencement of the arguments, and also under the record in this case this question was not material, and it was not a question of fact upon which appellant wished to have the jury find specially.

Although appellant in one of the errors assigned by him insisted that the verdict of the jury was contrary to the weight of the evidence, yet he failed to present any argument in support of such contention. However, we have considered the evidence and are of opinion that the verdict is not contrary to the manifest weight of the evidence.

The jury saw and heard the witnesses and the parties to the cause when they were upon the witness stand, and we do not feel disposed to reverse the cause because of a lack of evidence. It is evident that the jury did not believe the claim of appellant that appellee specially warranted the truck in all respects with the exception of the drive shaft.

The judgment of the County court is affirmed.

Affirmed.

(Four pages in original opinion)

abstract.
Opinion filed [illegible] 7-1936

.30

PUBLISHED IN ABSTRACT

Frank P. Weindorf, Appellee, v. B. H. Keck, Sheriff of the County of Logan and State of Illinois, Appellant.

Appeal from the Circuit Court of Logan County.

JANUARY TERM, A. D. 1936. 285 I.A. 600

Gen. No. 8961 **Agenda No. 10**

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is a suit in replevin commenced by Frank P. Weindorf, appellee, in the circuit court of Logan county, to recover the possession of a so-called pin-ball machine from appellant, B. H. Keck, sheriff of said county, who had seized the same without warrant or other process of law, but as claimed by appellant by virtue of an Act of the Legislature entitled an Act to prohibit the use of clock, tape, slot or other machines or devices for gambling purposes, approved June 21, 1895.

Appellee made a demand upon the sheriff for the property seized and upon a refusal by the sheriff to surrender the same sued out a writ of replevin, claiming the machine was not *per se* a gambling device.

Upon a trial of said cause by the court a judgment was entered in favor of appellee and this appeal is from that judgment.

We are without authority to review this case. There is no brief statement of the errors relied upon for a reversal of the judgment in the concluding subdivision of the statement of the case of appellant in his brief. Such statement of errors takes the place of the assignment of errors relied upon prior to the enactment of the Civil Practice Act.

Rule 9 of this court, identical with Rule 39 of the Supreme Court as amended, provides in part in relation to the preparation of briefs, as follows:

"The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal, or of the cross errors submitted by an appellee not prosecuting a cross appeal."

This case comes to this court by appeal and is not one of the actions excepted from the operation of the Civil Practice Act with respect to review in civil proceedings by the Supreme or Appellate Courts. Rules 1 and 2 of the Rules of Practice and Procedure of the Supreme Court of Illinois, as amended and in force June 18, 1935.

The abstract of the record contains what purports to be assignment of errors, but no such assignment of errors are written upon or appended to the record in this case, and even if there were it would avail nothing as this case is in this court on appeal from the Circuit Court of Logan county, the only method provided by the Civil Practice Act for its review, it being a civil case and not a proceeding that might be reviewed by writ of error sued out of this court.

In addition to Rule 9 of this court, Rule 1 (2) as amended provides in part as follows:

"No assignment of errors or cross errors shall be necessary, except the statement in the brief, at the conclusion of the statement of the case, of the errors relied upon for reversal, as required in Rule 9."

For the reason that we are without authority to review this case the appeal must be dismissed at the costs of appellant. *Farmers State Bank of Belvidere* v. *Myers,* 282 Ill. App. 549; *Bender, Admx., etc.,* v. *The Alton Railroad Co.,* No. 8969, filed in this court on February 29, 1936.

Appeal dismissed at costs of appellant.

Appeal Dismissed.

(Three pages in original opinion.)

ostract
Opinion filed - April 17-1936

.202

PUBLISHED IN ABSTRACT

Helen Keckich, Plaintiff-Appellant, v. New England Mutual Life Insurance Company, a Corporation, and Thomas J. Keckich, Defendants-Appellees.

Appeal from Circuit Court of Sangamon County.

JANUARY TERM, A. D. 1936. 285 I.A. 600

No. 8980 **Agenda No. 19**

MR. JUSTICE DAVIS delivered the opinion of the Court.

This appeal was taken by appellant from a judgment of the circuit court of Sangamon County dismissing said cause as to the defendant, Thomas J. Keckich, and entering a judgment in bar of the action as to said defendant.

It was submitted to this court for determination at the January Term, 1936, thereof. Upon an examination of the brief of appellant we find that we are without authority to review said cause.

Rule 9 of this court, as amended, provides that the concluding subdivision of the statement of the brief of an appellant shall be a brief statement of the errors relied upon for a reversal. No such errors are assigned. The assignment of errors in the brief of appellant is not a mere form that will be considered waived if not objected to, but is one of substance. It is the pleading in this court of appellant and if this court were to inadvertently reverse a judgment in a case where no errors were assigned the judgment would be set aside upon motion. *Rosin* v. *Wilde,* 80 Ill. App. 58.

The opinion of this court filed February 29, 1936, in the case of *Bender, Administratrix* v. *The Alton Railroad Co.,* No. 8969, is decisive of this question. See also *Farmers State Bank of Belvidere* v. *Meyers,* 282 Ill. App. 549.

The appeal is therefore dismissed at costs of appellant.

Appeal Dismissed.

(Two pages in original opinion)

stract #2.70

Opinion filed - April 17-1936
Rehearing denied May 27-1936

PUBLISHED IN ABSTRACT

John W. Cherry, Receiver, et al., Plaintiff-Appellant, v. Aetna Casualty & Surety Company, a Corporation, Defendant-Appellee.

Appeal from Circuit Court, Vermilion County.

OCTOBER TERM, A. D. 1935. 285 I.A. 601

Gen. No. 8948 **Agenda No. 26**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This case, which is based upon the fourth amended declaration of John W. Cherry, receiver, plaintiff-appellant, consisted of seven assignments of breaches of the bond sued on. The bond sued on was dated May 3, 1926, and recited that the principal Charles Benson, Inc., had entered into a contract with the Danville Hotel Company to construct an hotel building which contract was by reference made a part of the bond. The condition of the bond was that the principal should faithfully perform the contract on its part and satisfy all claims and demands incurred for the same, indemnify and save harmless the owner from all costs and damage suffered by reason of its failure to perform, reimburse and pay the owner all outlay and expense incurred by reason of default, and pay all persons who have contracts directly with the principal (Benson, Inc.) for labor or materials. The bond also contained a provision for the subrogation of the surety to all rights of the principal under the building contract.

Before the hotel building was completed Benson, Inc., failed to pay certain sub-contractors who filed mechanics' liens against the hotel property and the hotel company did not fully pay Benson, Inc. under its contract with it for the completion of the building. Following this John W. Cherry was appointed receiver and the Danville Hotel Company adjudicated a bankrupt in the United States District Court.

The original suit was brought on the bond by Cherry, as receiver, for the use of O. K. Yaeger and Carson, Payson Company, as sub-contractors. A judgment was entered on this suit in the full amount of the penalty of the bond, which was $822,699, against

Charles Benson, Inc., and the Aetna Casualty & Surety Company, the principal and surety on said bond, respectively.

The hotel company, in order to provide funds for construction, executed a trust deed on the property for $700,000 to secure certain bonds. These bonds were sold to divers persons who are represented in this suit by Hopkins, Todd and Simon as a bond holders' committee and are the beneficial usees in this proceeding for whom John W. Cherry as receiver assigns breaches. In the bankruptcy court a petition was filed to marshal all liens and securities by the trustee in bankruptcy, and all sub-contractors under Benson, Inc. and all bond holders, mortgagees, the surety company and the contractor, were made parties defendant, served with process and appeared in said cause. The sub-contractors claimed in this proceeding that their liens were prior to the lien of the first trust deed; the grantees in the trust deed and the bond holders' committee claimed the trust deed a first mortgage superior lien to all other liens. The Aetna Casualty & Surety Company and the contractor, Benson, Inc., in their answer, averred that Benson had made an assignment to the surety company and it was entitled to a lien against the hotel property superior to all other liens by subrogation for the amount due the general contractor which remained unpaid under the contract for construction. After hearing, the bankruptcy court ordered the property of the Danville Hotel Company sold free and clear of all liens, the proceeds to be subject to liens as if they were still real estate and the court further held that the liens of all sub-contractors were prior to the lien of the trust deed securing the bonds, that the Aetna company and Benson, Inc. had no lien whatever. The judgment of the district court of the United States in favor of the sub-contractors gave them a priority to the extent of $82,244.04. This judgment was upheld by the United States Circuit Court of Appeals. (38 Fed. (2nd) 10).

Upon sale the hotel property was bid in on behalf of the bond holders for a sum less than the total amount due on said bonds and the bond holders were required, as a condition precedent to purchase, by the federal court, to deposit with the court a sufficient sum of money to pay off prior liens of the sub-contractors, although the trust deed contained a provision that in the event of a sale, the bond holders could pay their bid in bonds if they became the purchasers. Subse-

quently the sub-contractors were paid out the money which the bond holders had deposited with the federal court.

The present usees now claim in this suit, by additional assignment of breaches of the bond, that they have a right to recover on account of the payment of the sub-contractors' claims out of the money which they were ordered to deposit with the trustee in bankruptcy by reason of the fact that they then obtained the same right by subrogation to sue upon the contractor's bond that such sub-contractors originally had.

Of the seven assignments of breaches in the said fourth amended declaration the plaintiff withdrew, the third, fourth and fifth, leaving the first, second, sixth and seventh assignments. The first alleged the obtaining of the judgment by plaintiff-appellant against Benson, Inc. and the Aetna Casualty & Surety Company hereinbefore referred to, on the 5th day of December, 1930, for $822,699; that certain damages to O. K. Yaeger and Carson Payson Company were ascertained in said cause; that the plaintiff, by virtue of the statute, filed additional breaches for Hopkins, Todd and Simon, trustees, to be collected out of said judgment or penalties. The first assignment and amendment thereto alleged the premium for the bond, its provisions, the contract between Benson and the hotel company, the contract between Benson, Inc. and certain sub-contractors for material and labor to the value of the priority which the bond holders were compelled to pay in the bankruptcy court, the failure of Benson, Inc. to perform its contract with the hotel Company and the failure of the general contractor to pay the sub-contractors. It further alleges the proceedings in the federal court hereinbefore stated, and the payment of the sub-contractors; that the payment to said sub-contractors was a payment by the owners of said bonds and their trustees by compulsion of the court for the protection of their lien and that the said bond holders are subrogated to all rights on the bond against the Aetna company which said sub-contractors had and that there is due from the Aetna Company, the sum paid the contractors with interest from July 28, 1928, amounting to $110,000.

The defendant-appellee originally filed seven pleas to the first assignment, all of which were withdrawn except the fourth and fifth. The fourth alleged that the bond contained the following provisions: "No suit, action or proceeding by reason of any default whatever,

shall be brought on this bond after twelve months from the day on which the final payment under the contract falls due," and that the filing of the declaration was more than a year from the date of final payment. Plaintiff filed a demurrer to this plea which was sustained and the defendant elected to abide by its fourth plea.

The fifth plea alleged substantially that the contract between the hotel company and Benson provided that the contractor should be paid the sum of $604,899, and extras in the amount of $12,421; that Benson completed the work and delivered the hotel building which was accepted on March 21, 1927, and that the hotel company failed to pay the amount due under the contract and was adjudged a bankrupt on July 17, 1927; that the sub-contractors obtained prior liens as hereinbefore set forth. It further alleged the proceedings in the United States district court and further that Charles Benson was paid $465,121, and that crediting the amount paid the sub-contractors by the bondholders, Benson was still entitled to $27,854, which amount was allowed in the bankruptcy as a common claim and upon which Benson, Inc. had received a dividend of $835.69. That by reason of the premises, Benson, Inc. had an equity superior to the equity of plaintiff and superior to the equity of the hotel company whereby neither the hotel company nor the trustees for the bond holders were subrogated to any rights which they could enforce against the surety company. The plaintiff filed its demurrer to this plea and the demurrer was overruled, and the plaintiff elected to abide by its demurrer.

The second assignment of breach alleges the execution of the trust deed by the hotel company; that the holders of the bonds were the owners of the property; that the deed in trust contained the covenant that the hotel property should be free and clear of liens except the first trust deed and that the hotel company would pay or cause to be paid the claims of any and all subcontractors and material men and that the Aetna Casualty & Surety Company, for a consideration paid by the hotel company together with Charles Benson, Inc. delivered the contractor's bond referred to herein to the hotel company and after reciting the failure of Benson, Inc. to pay certain sub-contractors, alleges that the bond holders entered into a bond holders' protective agreement with a committee consisting of Hopkins, Todd and Simon as trustees, and that the

trustees were third parties beneficiary and as such entitled to recover upon the bond. The defendant filed its demurrer to this assignment of breach and the demurrer was sustained, and the plaintiff elected to stand by the assignment.

The sixth assignment of breach alleges the consideration paid by the hotel company to the surety company for the bond; the failure of Benson, Inc. to perform its contract, and the filing of the mechanics' liens set forth herein; the payment of the liens of the sub-contractors to protect the interest of the bond holders and that the bond holders became subrogated to all rights that each of the sub-contractors had or could have enforced against Benson, Inc., or the Aetna surety company under said bond; that nothing has been repaid by the hotel company or the Aetna company and that the plaintiff, on behalf of the usees, who are the bona fide assignees and subrogees, is entitled to recover. To this assignment, the defendant, Aetna company, filed two pleas which were substantially the same as filed to the first assignment of breach. To these pleas the plaintiff filed four replications, the first alleging that the Aetna company paid nothing toward discharging the said sub-contractors' liens, reciting the covenant in the trust deed that the holders of bonds could apply them toward payment of the purchase price if the hotel building be sold by order of court and the proceedings heard in the federal court whereby the bond holders were required to discharge the sub-contractors' liens and that they thereby became subrogated to the right of the sub-contractors to recover on the bond.

The second replication alleged the proceedings in the bankruptcy court and the third replication alleged the original suit and judgment on said bond in favor of O. K. Yaeger and Carson, Payson and Company and the decision of this court upon appeal, and that the former judgment of the circuit court and of the appellate court constitute an estoppel by judgment and adjudication which prevents the Aetna company from again raising the question that it was not liable because the hotel company did not pay all that was due under its contract to Benson, Inc.

The fourth replication alleged that the mortgage upon the hotel property was held for the benefit of all persons who held bonds and that it contained a covenant on the part of the hotel company not to allow me-

chanics' liens to attach to the property until the bonds were paid and that the funds raised by sale of the bonds were to be used solely for the construction of the building; that the Aetna executed its bond with the knowledge of these provisions. To these four replications, the Aetna company filed a demurrer which was sustained by the court and the plaintiff elected to stand upon the replications.

The seventh assignment of breach is substantially the same as the sixth assignment to which the Aetna company filed substantially the same pleas as to the sixth assignment of breaches. A demurrer was filed to the first plea and sustained by the court and the plaintiff then filed four replications to the second plea which were identical with the first, third and fourth replications filed to the second plea of the sixth assignment of breaches.

The second replication alleged that the bond holders acted upon certain false representations made by Benson, Inc. and that the Aetna company, as the assignee of Benson, Inc. was estopped by reason of the fraud of Benson from claiming any lien of equal or prior rank to that of the bond holders. The defendant demurred to these replications, the demurrer was sustained by the court, and the plaintiff elected to abide by the said replications.

The plaintiff assigns as error that the the court overruled the demurrer of the plaintiff to the fifth plea of the defendant to the first assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the plaintiff's second assignment of breach of the fourth amended declaration; in overruling the demurrer of the plaintiff to the second plea of the defendant to the sixth assignment of breach of the fourth amended declaration; in overruling the demurrer of the plaintiff to the second plea of the defendant to the seventh assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the first replication of the plaintiff to the second plea of the defendant to the sixth assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the second replication of the plaintiff to the second plea of the defendant to the sixth assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the third replication of the plaintiff to the second plea of the defendant to the sixth assignment of breach of the fourth

amended declaration; in sustaining the demurrer of the defendant to the fourth replication of the plaintiff to the second plea of the defendant to the sixth assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the first replication of the plaintiff to the second plea of the defendant to the seventh assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the second replication of the plaintiff to the second plea of the defendant to the seventh assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the third replication of the plaintiff to the second plea of the defendant to the seventh assignment of breach of the fourth amended declaration; in sustaining the demurrer of the defendant to the fourth replication of the plaintiff to the second plea of the defendant to the seventh assignment of breach of the fourth amended declaration; in entering judgment in favor of the defendant-appellee and against the plaintiff-appellant in bar of action and for costs.

A cross-appeal was filed by the appellee in which it was alleged that after the original suit upon the bond was heard and judgment recovered against appellee, damages assessed in favor of Yaeger and Carson Payson, that the damages to these contractors were paid on January 28, 1932, and the judgment was released on the record in the following words: "This judgment satisfied this 28th day of January, 1932. Gunn, Penwell & Lindley, Swallow & Bookwalter, Attorneys for Plaintiff." That on August 17, 1932, the circuit court gave the plaintiff leave to file additional breaches and that the appellee appeared especially for the purpose of raising the question of satisfaction of the judgment in open court and of showing that there was no judgment on the records of the court unsatisfied. It further alleges that the plaintiff filed a motion to vacate the satisfaction of judgment and that the circuit court denied the motion of the surety company to quash the notice of application for inquisition of damages on additional assignment of breaches and to strike the amended declaration. That the court allowed the motion to set aside the satisfaction of judgment and that this action on the part of the trial court was erroneous and alleged further the error for adverse rulings to the defendant on demurrer as hereinbefore stated.

The pleadings and the assignment of errors upon the rulings of the court thereon raise the following

questions: (1) Whether the plaintiff, under the pleadings, has a right to recover upon the theory of subrogation; (2) whether the Benson, Inc. has an equity superior or equal to the plaintiff's by reason of the failure of the hotel company to pay what was due under the construction contract; (3) whether the plaintiff, under the pleadings, may recover as a third party beneficiary from the Aetna Casualty & Surety Company upon the allegations contained in the second assignment of breach and admitted by the demurrer thereto; (4) whether the plaintiff is barred from maintaining the action in the trial court by the limitation of time contained in the terms of the bond, or by the satisfaction of the judgment on the record as alleged in the cross-appeal.

It is contended by the appellant in this case that since the bond holders' committee was compelled by the United States district court to deposit $82,244.04 as a condition precedent to being permitted to bid at the trustee's sale, and since this money was for the purpose of paying off the sub-contractors who remained unpaid, the bond holders' committee thereby became subrogated to such sub-contractors' rights to sue the surety company under the clause in the bond whereby the surety company agreed to pay all persons directly contracting with Benson for labor and materials. It would appear that such subrogation would come within the classification of legal subrogation as distinguished from conventional subrogational which later type arises by virtue of an express contract. (*Novak* v. *Kruse,* 288 Ill. 363.) In that case the court incorporated in its opinion and approved the holding in *Home Savings Bank* v. *Bierstadt,* 168 Ill. 618, in which this distinction between conventional and legal subrogation is made. As stated in *Dunlap* v. *Peirce,* 336 Ill. 178, "Subrogation is the substitution of another person in the place of a creditor or claimant to whose rights he succeeds in relation to the debt or claim asserted, which has been paid by him involuntarily." This doctrine of legal subrogation is now much encouraged by the courts and is a remedy highly favored by them and the courts are inclined to extend rather than restrict the principle. (*Landis* v. *Wolf,* 119 Ill. App. 11. *Novak* v. *Kruse, supra.*)

In the instant case, through the order of the federal district court, the bond holders were not permitted to exercise the privilege which was written into the trust deed to use their bonds to bid upon the hotel property

at the sale unless and until they had deposited with the federal court a sufficient sum of money to take care of the sub-contractors and contrary to the contention of appellee in this case, that this money was obtained through the sale of property, it was actually deposited in cash by the bond holders under the order of court to pay off the sub-contractors. Appellee further contended that the plaintiff purchased like any other person at the trustee's sale and that there was no compulsion in the payment made by them when they received the property for their bid which included the cash deposit. This we do not believe is tenable, as other prospective purchasers were not required to deposit a sufficient amount of cash to pay off the material men's liens. The order of court, however, did compel the plaintiffs to do so if they desired to bid. Thus it appears to us that they come squarely within the rule stated in *Dunlap* v. *Peirce, supra,* and have the right to be substituted in the place of the sub-contractors as their payment was not voluntarily made. It is true as contended by appellee that subrogation is an equitable and not a legal right and will not be enforced when it is not equitable to do so or where it would work injustice to others having equal equities but it is certainly equitable to invoke the rule of subrogation where one individual is involuntarily compelled to pay the debt of a person standing in the position of creditor. In the case of *The Hibernian Banking Association* v. *Chicago Title and Trust Company,* 217 Ill. App. 36, which involved a trust deed containing a provision by which the mortgagor agreed not to suffer any mechanics' liens to attach to said premises nor permit anything to be done that might impair the value thereof, in that case the property was sold and the court ordered the payment of certain liens from the proceeds of sale, and it was held that the mortgagee had the right to pay the lien claims to protect his security and would thus be subrogated to the rights of the lien claimant. In *Dunlap* v. *James,* 174 N. Y. 411, the court, in stating the rule for the application of the doctrine of subrogation quotes from the case of *Cole* v. *Malcolm,* 66 N. Y. 363, as follows: "It is generally and most frequently applied in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is only secondarily liable for the debt; but it is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights or to save his own

property," and the court, quoting from and approving Cottrell's Appeal, 35 Pa. 294, further said: "Subrogation is founded on principle of equity and benevolence and may be declared where no contract or privity of any kind exists between parties. Whenever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditors possessed against the debtor." Our Supreme court, in *Thompson* v. *Davis,* 297 Ill. 11, points out subrogation is equivalent to an assignment of an encumbrance to the party entitled to be subrogated so that he may enforce the security and that in case of a mortgage this is so even though there has been no actual assignment and though the mortgage has been satisfied of record. Obviously, in the instant case, it was necessary for the appellant, in order to protect its property at the trustee's sale, to bid at that sale and since such bid was conditioned upon the satisfaction of the claims of the sub-contractors, we do not think it can be successfully contended that the appellant in such payment was a volunteer or that the payment was not made under compulsion. Such subrogee is invested with every right and remedy the subrogor possesses in reference to payment of the debt and stands in the shoes of the creditor paid by him. (*Dunlap* v. *James, supra. Lochenmeyer* v. *Fogarty,* 112 Ill. 572.) And by reason of such substitution, such subrogee can sue in all courts of law and equity in which creditor could himself sue. (*Stiger* v. *Bent,* 111 Ill. 328. *Krotein* v. *Link,* 173 N. E. 443.)

The fifth plea by the defendant to the first assignment of breach by plaintiff raises the contention on behalf of the defendant-appellee that the default upon the part of the owner of the hotel building to the contractor gives rise to an equity in favor of the defendant-appellee and is a defense which constitutes a defense to plaintiff-appellant's recovery. It appears to us that the Aetna company, by its bond, in effect made two bonds it made one payable to the owner and the other payable to the sub-contractors (*Alexander Lumber Co.* v. *Aetna Co.,* 296 Ill. 500) and only defenses in respect to the owner could be pleaded on the first and defenses in respect to the sub-contractor pleaded on the second. We believe that this contention on the part of defendant-appellant is fully and completely decided in the case of *John W. Cherry* v. *Charles Benson, Inc.* 264 Ill. App. 199, which was the original suit brought upon the bond in question in which the judg-

ment hereinbefore referred to was entered. In that case it was said: "Holding as we do that the condition as expressed in the bond in the case at bar is a direct promise of the principal in the bond to pay for all material contracted for by subcontractors and used in the building, appellant as surety is liable therefor and his liability cannot be avoided by the fact of the breach of the hotel company in failing to make the payments to the contractor, Charles Benson, Inc., at the times provided for in the contract." and the further contention of defendant-appellee that the case just referred to was a suit by a sub-contractor who had not been paid and that the instant case involves a subcontractor who has been paid, we think is without merit. If the sub-contractors involved in this suit had been paid by the surety company, a different question might be presented but these sub-contractors, as before pointed out, were paid by plaintiff-appellant.

The next question is weather the issue raised under the second assignment of breach will entitle the plaintiff-appellant to sue the surety company as third party beneficiary. It appears to us that the bond holders were promised by the hotel company when the money was furnished by the bond holders that they would build the hotel and that no lien would be allowed to accrue on the property prior to the bond holders' first mortgage lien. The Benson company, the general contractor, promised the hotel company that it would complete the building and pay for the material and labor used in its construction. The Aetna surety company having knowledge of these promises, executed the contractor's bond as surety so that the promise of Benson Inc. and the Aetna company was that no liens would accrue against the property which would jeopardize the rights of the bond holders. In the case of *Carson Pirie Scott & Co.* v. *Parrett,* 346 Ill. 252, which case involved the same hotel company as in the instant case, where the question was raised upon the right of a person to sue as third party beneficiary, the court said: "The rule is settled in this State that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon." The court then cited a number of cases in Illinois which expound this rule, and in

that case the court further said that each case must depend upon the intention of the parties as that intention is to be gleaned from a consideration of all of the contract and the circumstances surrounding the parties at the time of its execution. As we have stated, the bond in this case was conditioned upon the faithful performance of Benson, Inc. in the construction of the hotel and the payment for the material and labor therefor. The bond holders furnished their money for the purpose of accomplishing the result of having a completed building against which the lien of the trust deed securing their bonds should be a first lien. We, therefore, believe that the contractual obligation of this bond was entered into for the direct benefit of the bond holders and that under the rule laid down in the case just cited, the bond holders would have the right to sue the surety company in case of the default on the bond as third parties beneficiary.

By the fourth plea to the first assignment and its first plea to the sixth and seventh assignments, the defendant-appellee contends that the bond issued by it contained a twelve-month provision and that this provision bars the assignment of breaches by the trustee of the bond holders on the theory that the action in this case was not brought within the time stipulated in the bond. Smith-Hurd Illinois Revised Statutes 1933, Chapter 110, Section 35, which was in force at the time this suit was instituted, specifically provides that a judgment entered on a penal bond shall stand as security for other breaches as may afterward happen. In the case of *Cherry* v. *Benson,* 264 Ill. App. 199, hereinbefore referred to, a judgment was entered on the bond in this case in a suit started within the time limited by the bond to commence suit. This judgment, under the statute, stood as security for other breaches that might be assigned and the mere fact that the statute refers to a penal bond does not alter the situation in this case, as our Supreme court has declared in the case of *Dent* v. *Davison,* 52 Ill. 109, that there is no difference between a private penal bond and an official penal bond, in this regard. It is further contended by defendant-appellee that because the bond in question provided that no suit, action or proceeding by reason of any default whatever should be brought on this bond after twelve months, etc., includes such assignments of breaches upon which recovery is sought in the instant case and relies upon the case of *McDole* v. *McDole,* 106 Ill. 452, claiming that the assignments of breaches

of plaintiff-appellant constitute a splitting of actions. The case cited by appellee is based upon the case of *People* v. *Compher,* 14 Ill. 447. In the Compher case the court pointed out that once a judgment had been entered upon a bond, no further action could be maintained upon the obligation for it had merged into judgment. The judgment was for the entire penalty and no further proceedings can be had thereon except by the way indicated by the statute; i. e. by further assignment of breaches. This would indicate a continuation of the same action by new assignments of breaches and if there had been only nominal damages assessed in favor of Yaeger or Carson in the original case when the original judgment was obtained on the bond, we think that additional breaches could have been assigned in this case. (*Lesher* v. *United States Fidelity & Guaranty Company,* 144 Ill. App. 632.)

We, therefore, believe that the suit was instituted within the limitation of time placed in the bond and the additional assignment of breaches at this time is perfectly proper, so long as it is within the general statute of limitations.

The only other question in this case is raised by the appellee by way of cross-appeal and that is that the satisfaction of judgment entered upon the records by the attorneys for Yaeger and Carson in the original suit, constitutes a satisfaction of the judgment and a bar to plaintiff-appellant's recovery. In addition to the showing of the plaintiff in support of his motion to vacate and correct the purported satisfaction, the affidavits of O. K. Yaeger, William H. Carson, president of Carson Payson Company, of Mr. Gunn and of Mr. Brookwalter, their attorneys, were filed showing the amount assessed to them as damages, the receipt of the same from the Aetna company, that no other amount was ever paid and that no attorneys of theirs had any authority to make full satisfaction of the judgment entered. As has been pointed out, when a suit is brought on a penal bond and developes into a judgment for the penalty of the bond, the bond is then merged into the judgment and no other suit by any person could be instituted on the same bond, and if the trial court did not have the power to correct such judgment, one who obtains nominal damages in the original suit could then release the judgment when his claim was satisfied and others who might have damages which they should collect against a surety in large amounts would be barred from doing so because

only one suit would lie upon the bond. Certainly, the purported release by the attorneys for Yaeger and Carson did not and could not bar the right of any third person, and the court, therefore, committed no error in setting aside such false satisfaction. (*Western Tube Company* v. *Aetna Indemnity Company,* 181 Ill. App. 592.)

For the reasons given, we believe that the court erroneously sustained the demurrers of the defendant to the second assignment of breach and to the replications of the plaintiff to the second pleas to the sixth and seventh assignments of breach and in overruling the plaintiff's demurrers to the fifth plea to the first assignment of breach and to the second plea to the sixth and seventh assignments of breach. This case is, therefore, remanded to the circuit court, with directions to overrule the demurrers of the defendant to the second assignment of breach and to the replications of plaintiff to the second pleas of defendant to the sixth and seventh assignments of breach and to sustain the plaintiff's demurrers to the fifth plea to the first assignment of breach and to the second plea to the sixth and seventh assignments of breach, and that such other proceedings may be had consistent with the pleadings and not inconsistent with this opinion.

Reversed and Remanded with Directions.

(Twenty-seven pages in original opinion)

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inion filed April 17, 1936
earing denied May 27, 1936

PUBLISHED IN ABSTRACT

In Re Estate of Enoch Brock, Deceased; Electa Fenstermaker, Plaintiff-Appellee, v. Mattie Brock, Administratrix, Defendant-Appellant.

Appeal from Circuit Court, McLean County.

JANUARY TERM, A. D. 1936.

285 I.A. 601

Gen. No. 8950 **Agenda No. 8**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This appeal is from a judgment entered in the circuit court of McLean county, Illinois, in the amount of $3,211.20 rendered against the defendant-appellant, Mattie Brock as administratrix of the estate of Enoch Brock, deceased. The claim which plaintiff-appellee made was for an alleged balance due her under a contract of employment for salary computed at the rate of $15 a week, and extending from January 1, 1925, to the time of the death of her employer, Mr. Brock, on August 8, 1933, a period of some 8½ years. The plaintiff was secretary and stenographer for Mr. Brock, a lawyer, and had worked for him for many years. The balance due was arrived at by making the charges for the period stated, and after crediting $240 for 16 weeks off, and $3,268.80 which had been paid during that period. The claim was first heard in the probate court where it was dismissed for want of merit, the court finding that the appellee was an incompetent witness in her own behalf, and failed to support her claim by competent proof. The appellee, as claimant, then appealed to the circuit court where a trial was had without a jury, which resulted in the judgment herein referred to. In support of her claim the appellee called ten witnesses, besides herself, most of whom testified merely to their visits to Mr. Brock's office where they had seen appellee employed as a secretary and stenographer. Some of the witnesses testified as to business transactions handled by the appellee in Mr. Brock's office, but none of them testified to anything about the business relations of the appellee with her employer, except one, who testified that he saw appellee in Mr. Brock's office; that she was his secretary; that he had talked to Mr. Brock in the fall of

1932 about his financial condition; that Brock said he owed some $4,000 or $4,200, $500 or $600 in small bills, and the rest in the Corn Belt Bank; that he owed appellee quite a little, and that he would like to get a farm loan to take care of those matters; and that a $7,000 loan was discussed.

This witness further testified that several years before, while talking to Mr. Brock about the girl who worked in his office, he told Brock that he had raised her salary to $15 per week, and that Brock had said, "That is the same as I am paying my girl." In addition to this testimony appellee produced some loose sheets taken from an old book which contain entries over a period of several years, 1924 and 1925, which have a number of items designated "salary," many of which are $15 items, and which appellee testified represented her receipts, and had reference to just what she had received; that they were kept by her in the usual course, were true and correct, and were original entries. She further testified that she had transcribed the items on the yellow sheets to the pages of a bound book which was introduced in evidence, and that she kept the original entries in the bound book for the years 1927 to 1933. This book likewise shows entries for "salary," most of the items being in the amounts of $5, $10 and $15. Mr. Brock's name only once appears, and is given credit by cash for $5, in these records.

In addition appellee also offered in evidence six pages of a vest pocket memorandum, the first page of which was headed "Paid Miss F." followed by a column of dates and a column of figures. This was also introduced as an original book of account. Over objection appellee was allowed to testify that it was Mr. Brock's book, that he made the entries, that it was in his handwriting, and that he did not have any other book in which the account was kept. Further that the book had been presented to her for comparison, and discussed with her, and that she had observed Mr. Brock make entries in the same when payments were made. That the entries in the two books referred to the salary account.

It appeared on cross examination that appellee kept books for Mr. Brock in his office, wrote checks on his account, and was his cashier, and kept other books of account for the decedent. Appellant contends that the judgment in the trial court should be reversed because the appellee is not a competent witness in her

own behalf in support of her claim against the estate, that the court erred in not limiting her testimony to the identification of her books; that records admitted in evidence are not books of account within the purview of section 3 of the Evidence act, were inadmissible, and if admitted without explanations made by appellee's testimony, fail to prove her claim; that the items of wages anti-dating five years the date of the death of the deceased are barred by the statute of limitation.

Ill. State Bar Stats. 1935, Chap. 51, Sec. 2, provides: "no party to a civil action, suit or proceeding, * * * shall be allowed to testify therein * * * in his own behalf, * * * when any adverse party sues or defends as the * * * administrator * * * of any deceased person," (*Grinton* v. *Strong,* 148 Ill. 587; *Branger* v. *Lucy,* 82 Ill. 91; *Kempton* v. *People,* 139 Ill. App. 563.) This is modified by Chap. 51, Sec. 3, to the extent that "where in any civil action the claim or defense is founded on a book account, any party or interested person may testify to his account book and the items therein contained; that the same is a book of original entries and that the entries therein were made by himself, and are true and just, or that the same were made by a deceased person, * * * in the usual course of trade" (*Alling* v. *Brazee,* 27 Ill. App. 595; *Miller & Graves* v. *Pratz,* 179 Ill. App. 204.) In the instant case the plaintiff introduced into evidence certain records which she testified were books of account but they did not in any way substantiate her contention as to any contract with her employer for a certain stipulated salary. It would be necessary to consider her general testimony relative to the transactions purported to be shown by this set of records in order to make them valuable in supporting her case. Obviously, the statute does not permit her general testimony in this regard, and in the face of the further fact that there is nothing shown in the books of account which the plaintiff appellee kept for Mr. Brock which has anything to do with her salary account the so-called "books of account" which were introduced in evidence, to-wit, the pocket memorandum kept by Mr. Brock, and the book in which plaintiff shows her receipts for salary, along with other items of receipts, is not sufficient in our opinion to establish a contract between the plaintiff, and her employer at the rate of $15 per week, or for any given period.

To be received in evidence books of account must be books of original entry of transactions made as

they occurred in the regular course of business *Kibbe* v. *Bancroft,* 77 Ill. 18; *Brooks* v. *Funk,* 85 Ill. App. 631. It does not appear that the exhibits introduced by the appellee as books of account meet these qualifications. There is nothing in the manner in which entries are made therein that would indicate they were kept in the regular course of business, for in plaintiff's book she has distributed receipts by her to various dates which do not correspond with any record which was kept by Mr. Brock in his memorandum book, except as to totals, and there are not the usual debits and credits in either of these records that are customary in a regular book of account. Had there been a salary account in the regular books of Mr. Brock, kept by the appellee, with debits on the account for salary earned and credits for salary paid, it could be taken as some evidence at least of an arrangement to pay a certain salary, but in this case the appellee kept her purported account book and Mr. Brock kept his memorandum, absolutely separate from the books of the office. And there is nothing in either one to show a running account of salary with the usual debits and credits. So far as this court can see the purported account books offered in evidence are nothing more than memoranda, and as such are not admissible as independent evidence but only for the purpose of refreshing the recollection of the witness, (*Western Union Cold Storage Co.* v. *Warner,* 78 Ill. App. 577; *Sullivan* v. *Miller,* 169 Ill. App. 807.) Since the plaintiff cannot testify in her own behalf these memoranda become valueless as evidence in this case to establish a contract. As said by the court in *Cairns* v. *Hunt,* 78 Ill. App. 420, in reference to a memorandum which was offered in evidence, "It is a mere memorandum for the convenience of a real estate firm and discloses no purpose to charge or bind any one. Such memoranda are sometimes resorted to to aid the memory of a witness, but not as proof to the jury of a disputed fact." So, in the instant case the memorandum which was introduced in evidence by plaintiff-appellee which consists entirely of cash items received in her book and apparently of cash items paid in the memorandum book of Mr. Brock, and neither of which contain any charges against any person and certainly cannot be said to have been kept in the regular course of Mr. Brock's business, cannot be considered to be books of original entry, and entitled to be admitted under section 3 of the statute referred to.

The only other evidence which was offered which would tend to support the contention of plaintiff-appellee was the statements of the deceased, Mr. Brock, in a conversation between himself, and the witness Payne, which occurred several years prior to his death, in which he told the witness that he was paying his girl $15 a week and that he owed her quite a little. We do not think that this testimony is sufficient to establish a claim against the estate of Mr. Brock. There is nothing in this testimony to indicate that he had a contract to pay his stenographer and secretary a particular wage, or what amount he then owed her, or whether it was money that was owed. The courts of this state do not consider the uncorroborated admission of a deceased, particularly where it occurs in a casual conversation, to constitute the type of evidence required to establish a claim against the decedent's estate. (*Delee* v. *Leahy,* 278 Ill. App. 178. *Bragg* v. *Geddes,* 93 Ill. 39.) For the reasons given we believe that the judgment of the trial court should be reversed.

Judgment Reversed.

(Nine pages in original opinion)

Abstract
Opinion filed April 7-1936
$1.00

PUBLSHED IN ABSTRACT

Agnes Fromme, Appellant, v. City of Girard, Illinois, a Municipal Corporation, Appellee.

Appeal from Circuit Court, Macoupin County.

JANUARY TERM, A. D. 1936.

285 I.A. 601

Gen. No. 8963 **Agenda No. 11**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This was an action by plaintiff-appellant, Agnes Fromme, against defendant-appellee, the City of Girard, Illinois, to recover damages occasioned by plaintiff's falling on an alleged defective sidewalk in said city, on the evening of April 19, 1933. Notice of the injury was filed with the city attorney and with the city clerk of Girard, Illinois, on June 6, 1933, and thereafter a complaint was filed in the circuit court of Macoupin county by the plaintiff to the January term, 1934, said complaint being filed on the 9th day of January of said year. An answer was filed by the city on February 5, 1934, and subsequently the complaint was amended by leave of court, in September, 1934, to be against the City of Girard, Illinois, instead of the Village of Girard, as originally drawn. The cause was tried on the amended complaint, and resulted in a disagreement of the jury. A new trial was ordered. Subsequently, by agreement of parties, a jury was waived and the cause was heard by the three judges of the seventh judicial district sitting en banc. This court has not been favored with either the record proper or with a report of proceedings at the trial, and, of course, there is no abstract thereof. In lieu of such record on appeal counsel for all parties litigant have filed a copy of the declaration, and of a notice of suit to be brought which was served on the city attorney and on the city clerk, together with a copy of the order finding the issues in favor of the plaintiff and against the defendant, and assessing the plaintiff's damages at the sum of $1,500, and entering judgment thereon; also a copy of the order denying a motion for new trial, certified to by the clerk, together with an agreement to submit to the Appellate court propositions of law. This agreement recites the judgment;

that the injury occurred on April 9, 1933; that on the 16th day of January, 1935, the time of trial, that plaintiff was still crippled, walking with a crutch, and her arm too weak to enable her to do her usual work. That after nearly two years she was still crippled and unable to do her regular work, and that the doctor's testimony was that the bones had not properly knit, and caused her difficulty, especially in any effort to ascend steps; that there was no allegation as to the permanence of the injury in the declaration, and that the judges sitting en banc did not consider permanent injuries in fixing damages for that reason. The following questions of law were submitted: First: On the part of or in behalf of the city of Girard: That the notice of the accident or injury served upon the city attorney and upon the city clerk of the city of Girard, and notice of suit or intent to sue, were insufficient in that (a) the notice did not sufficiently describe the place of accident at which complainant or plaintiff was injured; (b) that the residence of complainant or plaintiff was not set forth in said notice with sufficient definiteness. Second: On the part of or on behalf of complainant or plaintiff, Agnes Fromme, that it is not essential or necessary to allege in the declaration the matter of permanent injuries in order to sustain an award for personal permanent injuries if the proof in the trial court so establishes them. Both plaintiff and defendant in their briefs discuss many other questions. From these briefs together with the stipulation mentioned, and from the evidence which is not in dispute, it appears that on April 19. 1933, at about 7:30 P. M., the plaintiff, her sister, and a friend, were walking in an easterly direction on a public sidewalk in said city when the plaintiff stumbled over a section of concrete sidewalk elevated two and one-half to four inches above the adjoining section, causing the plaintiff to fall, by reason of which fall she sustained injuries to her knee and wrist. At this trial a judgment was rendered against the city for $1,500, and the city filed a motion for a new trial which was overruled. The defendant offered no evidence, taking the position that the notice served on the city was insufficient, (1) through failure to adequately describe the place of the injury, (2) because it incorrectly set forth the residence of the plaintiff. It further urged that the defects in the walk were not in themselves sufficiently dangerous to require the city to respond in damages.

On June 3, 1935, the plaintiff filed a motion to vacate the judgment, and to enter a judgment commensurate with the proof on the ground that the court had erred in failing to consider permanent injuries to plaintiff under a misapprehension that it was necessary that such permanent injuries be alleged in the complaint. Subsequently it was agreed to submit this case to this court upon the hereinbefore mentioned stipulation.

As to the question of notice, Ill. Rev. Stats., 1931, Chap. 70, Sec 7, provides: "Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney ,and also in the office of the city clerk) a statement in writing, signed by such person, his agent, or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)" The notice which was given in the case at bar was as follows:

"1. My name is Agnes Fromme.

2. I reside at Girard, Ill.

3. The accident by which I received such personal injury occurred on the 19th day of April, 1933, at about the hour of 7:30 o'clock, P. M. at about ½ block west of Interurban Station between Girard Bakery and Interurban Station.

4. My attending physicians were:

Dr. G. H. Hill—address—Girard, Illinois.

Dr. Chamness — address, Carlinville, Macoupin Hospital.

Dr. G. W. Staben—address, Springfield.

Dated this 6th day of June, 1933.

Signed: Agnes Fromme, Plaintiff.
By R. W. Gill, Attorney.

R. W. Gill, Attorney for Plaintiff,
214½ South Sixth St., Springfield, Illinois."

In the case of *Wikel* v. *City of Decatur,* 146 Ill. App. 51, which case involved a suit for damages for injuries resulting from a fall upon a defective sidewalk, the notice designates the sidewalk in question as "being situate on the west side of a certain public street originally laid out and designated as Chisholm street, but now commonly known as and called East

avenue; said street being between Stone and Stock streets in said city, and that the place where the said sidewalk was out of repair was at a place where a certain alley intersects said street between the Wabash railroad right of way and East Eldorado street, and near the residence of the undersigned, Amanda J. Wikel; that her residence is 541 East Avenue, Decatur, Illinois;" In discussing the sufficiency of this notice, Mr. Justice Baume of this court said, "The sufficiency of notice was a question of law for the court and not a question of fact to be submitted to the jury. The objection to the notice urged by counsel for applicant" (that it did not properly designate the place of the accident) "is hypercritical. A description in such notice of the place where the injury occurred is sufficient if it will enable the municipal authorities to ascertain the place by the exercise of reasonable diligence, and such description may be by reference to particular buildings, or to another street, or to natural objects." We are of the opinion in the case at bar that the notice was sufficient in the description of the place where the injury occurred, so that the municipal authorities could by the exercise of reasonable diligence have located the place where the injury occurred by the description given.

The other element of the notice which was objected to was the description of the residence of the plaintiff. In case of *Swanson* v. *City of Aurora,* 196 Ill. App. 83, in reference to the omission of the place of residence of the injured person, in the notice, the court said: "But the most serious defect in the notice in question is the failure of the appellee to state his place of residence. The residence given in the notice was not his and never had been. The ommission of the place of residence is clearly fatal to the validity of the notice. And it is clear that this defect cannot be cured by the showing that he resided at some other place on the same street, for it is the very fact that he resided at some other place than the one mentioned in the notice that renders the notice invalid." This holding has been approved in *Frey* v. *City of Chicago,* 246 Ill. App. 172.

Referring again to the notice given in the case at bar under item 2, it recites, "I reside at Girard, Ill." In the briefs submitted by counsel in this case it is claimed by appellee that appellant lived just "outside the city limits of Girard, Illinois," and by appellant

that she lived "in Girard, Illinois." It might well be said that if the residence of the plaintiff was not within the corporate limits of the city of Girard, Illinois, then following the rule of the cases hereinbefore cited, the notice would be insufficient in that regard, but there is nothing before this court to show whether the notice in the case at bar correctly stated the address of the plaintiff, and we cannot therefore pass upon the sufficiency of the notice in so far as the residence of the appellant is concerned.

As to the proposition submitted on behalf of the plaintiff we believe the rule is well established that it is not necessary to allege permanent injuries in the complaint in order to sustain an award for permanent personal injuries if the proof upon trial establishes permanent injuries. This rule was recognized in the case of *Eagle Packet Company* v. *Defries,* 94 Ill. 598. In that case the court said: "The declaration expressly alleges that the plaintiff 'then and there became and was sick, lame and disordered, and so remained for a long time, * * * hitherto,' The permanency of plaintiff's injury was merely evidence to be considered by the jury in determining the severity of plaintiff's sickness, lameness and disorder, and the rules of pleading do not require the plaintiff to set forth in his declaration the evidence upon which he relies." Again, in the case of *City of Chicago* v. *Sheehan,* 113 Ill. 658, where the declaration did not allege permanent injury, the court said: "It is enough that the declaration showed the injury received, without describing it in all its seriousness, and the recovery could be to the whole extent of the injury." These cases have been followed and approved in the case of *Klatz* v. *Pfeffer,* 333 Ill. 90. Nevertheless, this court could not enter a new judgment in lieu of the judgment rendered in the trial court without having before it all of the necessary facts, and as this case comes to this court without a complete record of the evidence this court will not enter a new judgment in lieu of the judgment entered in the trial court since the facts set up in the stipulation are not sufficient to enable this court to determine the nature and extent of the permanent injuries of the appellant. Therefore, this cause is remanded to the trial court for a new trial, with instructions that the plaintiff be permitted under her complaint to show the nature and extent of the permanent injuries, if any, and for such other proceedings as are not inconsistent with this opinion.

Reversed and remanded for new trial at which time the plaintiff should be permitted under her complaint to show the nature and extent of her permanent disabilities, if any, and for such other proceedings as are not inconsistent with this opinion.

(Ten pages in original opinion)

(2593—12)

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Opinion filed April 17-1936

PUBLISHED IN ABSTRACT

William C. Means, Executor of The Last Will and Testament of W. L. Green, Appellee, v. H. W. Green et al., Cecil Green, Ivan Green, Alice Green and Lyle Green, Appellants.

Appeal from Circuit Court, McLean County.

285 I.A. 601

JANUARY TERM, A. D. 1936.

Gen. No. 8975 **Agenda No. 17**

MR. JUSTICE ALLABEN delivered the opinion of the Court.

The plaintiff-appellee, William C. Means, as executor of the last will and testament of W. L. Green, deceased, on March 26, 1935, filed a petition in the circuit court of McLean County, Illinois, to construe the will of W. L. Green, deceased. The deceased was a bachelor and left surviving him as his heirs the descendants of two deceased brothers, O. A. Green and Lauton Green. The testator died seized of farm lands in McLean County, Illinois, and in Iowa and in Missouri, which under the terms of the will were to be sold and the proceeds divided.

The petition which was filed asked for construction of the will and codicils thereto, and alleged that various amounts of money were due from the devisees to the testator for loans which he had made to them in his life time. The petition further set forth the contention of the different parties interested as to the proper construction of the will and codicils. At the time the original will was drawn and executed the testator's two deceased brothers were living, and under the terms of the will, after the payment of debts and the bequest of the perpetual care of a cemetery lot, his estate was devised to the two brothers with the provision that all money which had been advanced or loaned to the nephews and niece, children of O. A. Green, interest thereon, and including certain specific sums named by the testator, should be deducted from the share devised to O. A. Green, and that any sums advanced to the children of Lauton Green, together with interest should be deducted from his share. In the first codicil the testator increased the charge against the share of O. A. Green from $3,000 to $9,100

because of moneys due from a nephew, Bert Green, and the codicil further provided that in the event that either of the brothers should predecease the testator the share which would have gone to that brother should become the property of his descendants. The second codicil to the will is in words and figures as follows, to-wit: "It is my will that since both of my brothers, O. A. Green and Lauton Green, have died since the making of my will and codicil, it is now my will that after the payment of my debts, my property, including all the advancements which I have made to my nephews and nieces shall be divided equally between the heirs of Lauton Green and the heirs of O .A. Green, each set of heirs to receive one-half, and that against each of their respective shares will be charged the amounts of money which they have already received from me, and including the amount mentioned against my nephew, Bert Green, the total sum against him being $9,100.00 and interest thereon from the date of May 5, 1925. It is my will that all of the monies that my nieces Caroline Riggs and Maude Rugless, and my nephews, the children of both of my brothers, have received from me shall draw interest at the same rate, viz: 6% interest." The appellants, Cecil, Alice, Ivan and Lyle Green, are grand nephews and grand niece of the testator, being the children of Alonzo Green, the son of O. A. Green, brother of the testator. In addition to appellants, the other heirs of O. A. Green are Earl Riggs, the son of Caroline Riggs, deceased daughter of O. A. Green, and H. W. and E. P. Green, both children of the said O. A. Green. The Lauton Green heirs consist of Maude Rugless and Harry Green, children of the said Lauton Green. The appellants answered the petition contending that the proper construction of the will and codicils was that the residue of the estate, including the advancements should pass to the respective heirs, the same as though said estate descended to them according to the statute of descent; that appellants should each receive 1/32 of the residue including advancements, and that the words "respective shares" in the second codicil should be construed to mean the respective share of each heir individually, and not the shares of the two groups of heirs collectively. H. W. Green filed an answer denying that he was indebted to the testator as stated in the will and codicil.

By her answer Florida Riggs alleged the assignment to her of the interest of Earl Riggs; denied the indebt-

edness of Caroline Riggs to the testator and alleged that the testator should have filed a claim for the alleged indebtedness against the estate of Caroline Riggs. This latter contention was overruled by the court on a motion to strike by plaintiff. Harry Green and Maude Rugless, as the heirs of Lauton Green, in their answer contended that the total estate, including the indebtedness of all the children of the two brothers should be divided into two equal portions, one-half to be taken by the O. A. Green heirs, and from which all of the indebtedness of that set of heirs was to be deducted; the other one-half to be taken by the heirs of Lauton Green subject to the deductions of all advancements to that set of heirs, with the right of contribution as between the heirs respectively in each group.

A decree was entered, finding to be due the estate, from the O. A. Green set of heirs, $33,455, and from the Lauton Green set of heirs, $13,632, and the decree further found, in construing the will and codicil that the net estate, including advancements and loans, made by the testator, together with interest, was to be divided into two equal portions, one portion to go to the family of O. A. Green, and the other portion to the family of Lauton Green; that from the share going to each of said families there should be deducted the total loans and advancements made to the members of each of said families, and the balance, if any, to be distributed among the members of each family according to the statute of descent, there being charged against each individual share the amount of the loan he or she had received.

From this decree this appeal is prosecuted, the appellants contending that the trial court erred in finding that it was the intention of the testator to divide the estate into two parts one part to go to each set of heirs, and that each set of heirs was to be charged with the moneys advanced to that set. Further error is assigned because of the finding that the total amount of loans and advancements made by the testator to the members of the two families should be deducted from the share going to such family, and in finding that the balance, if any, should be distributed among the members of that family in accordance with the statute of descent, charging against each individual share the amount of the loan which he or she had received, and in not finding that it was the testator's intention to divide all his estate including property loans and advancements into two equal parts, one part to go

to the heirs of O. A. Green and one part to the heirs of Lauton Green, and that against the individual shares of each should be charged the money advanced or loaned by the testator to each heir. There was no question raised by appellants as to the amounts found due from the heirs to whom advancements or loans were made, but the appeal is based upon the construction placed by the decree on the language of the second codicil of the will herein quoted.

It is a well settled rule of will construction that a will and its codicils are to be construed together as one instrument. (*Kern* v. *Kern,* 293 Ill. 238.) The original will and the codicils by interpretation should become a consistent, harmonious whole, carrying out the general scheme of the testator, according to his expressed intention. (*Clark* v. *Todd,* 310 Ill. 361. *Tucker* v. *Tucker,* 308 Ill. 371.) Where a codicil to a will changes the general scheme of the original will the will itself will be modified only to such an extent as to give effect to the codicil. (*Vestal* v. *Garrett,* 197 Ill. 398.)

In this case we believe it is apparent from the context of the original will that the testator's intent, as expressed therein was that his property should be converted into cash, and divided equally between the two brothers, O. A. Green and Lauton Green, upon the condition, however, that moneys loaned by him to the nephews and niece, the children of O. A. Green, should be deducted from that share and any sums of money advanced to the children of Lauton Green should be deducted from that share.

A consideration of the second codicil, which is the one in question here does not, in our opinion, change the general scheme outlined in the original will, for by this codicil the testator provided that the shares which would have gone to his brothers, O. A. Green and Lauton Green should descend to their heirs, and as expressed in the codicil, "each set of heirs to receive one-half" This is consistent with the original will because the testator has made the heirs of each of the brothers in the distribution of his estate stand in the place of the deceased brother After the words "each set of heirs to receive one-half," the codicil porvides "and that against each of their respective shares will be charged the amounts of money which they have already received from me..." This likewise is not inconsistent with the scheme of the original will and can clearly be harmonized with the general intention

of the testator therein expressed. By the original will any sums advanced by the testator to his brother's children were to be deducted from that brother's share whose children they were. By this codicil it is reasonable to say that the testator intended that the advancements made to the heirs of either of the deceased brothers should be deducted from the share devised to the set of persons who were entitled to receive the portion of the estate originally devised to that one of the brothers. In other words, by making the shares of the deceased brothers go to a group of persons instead of one person, it is not inconsistent to say that it was the intention of the testator that the advancements should still be deducted from the share. A per stirpes distribution is clearly indicated by the original will by the use of the language therein, "it being my intention that my brother O. A. Green and his family shall receive the same amount of money that my brother Lauton Green and his family shall receive, after taking into account all monies that either family have received during my lifetime." If the interpretation is not accepted that the obligations of each set of heirs are to be charged against the share going to that set of heirs then a result would obtain that is clearly contrary to the general intention as expressed by the testator, for it is indicated that the distributable portion of the estate will amount to approximately $70,000, $35,000 of which would go to appellants. By deducting the $33,655 already received by this set of heirs it would leave a sum for distribution to that set of approximately $1,345. Since both H. W. Green and Harold Riggs, who belong to this set of heirs have borrowed $27,750 of the share going to this set of heirs, which would be $10,000 more than their share, and since both of these individuals are hopelessly insolvent, then if the other two divisions of this group, to-wit, E. P. Green, and the Alonzo Green children, should receive the portion due them, which would be $8,750 in the case of the Alonzo Green children and $3,190 in the case of E. P. Green, the latter having already borrowed $5,560, it would mean that this group of heirs would receive $10,000 more than its share. This certainly is not in accordance with the testator's intention. In the case of *Jordan* v. *Jordan,* 274 Ill. 251, the testator provided by his will that certain advancements made to his grand son for educational purposes and represented by the grandson's promissory notes to the testator, should be deducted from the

share going to the grandson's father, the sum deducted to be distributed equally among all the children of the testator, and in case of the death of any of the children leaving children surviving, the children of the deceased parent were to share and share alike in the same. Thereafter the son of the testator, father of the grandson, died, leaving eight children, and the court decided that the debts of the grandson to the testator were chargeable pro rata against all of the heirs. In that case the court said: "The question whether the Appellate Court was right depends upon the proper construction of the will, the purpose of which is to give it the interpretation, and meaning which the testator intended it should have. In seeking for the intention the whole scope and plan of the testator is to be considered, and the intention is not to be gathered from one clause of the will, alone, but from all its parts." The court further said: "His intention, as it appears to us, was to accomplish an equal distribution among the children or those representing them. For that purpose he provided for deducting the advancements to Orvis F. Jordan (grandson) from the share of William N. Jordan, (father) which now goes to his children, and in our judgment the circuit court was right in that conclusion." So, in the instant case where the testator originally left property to his brothers, charging their shares with the loans and advancements to their families, and later by codicil giving the shares of these brothers to the sets of heirs representing them it was, we believe, his intention that the obligation to the testator of the members constituting each set of heirs, were to be charged against the share going to that set of heirs.

For the reasons given the decree of the circuit court is hereby affirmed.

Decree affirmed.

(Eleven pages in original opinion)

Abstract
Opinion filed April 17-1936

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PUBLISHED IN ABSTRACT

Herman Stroops and Chas. M. Peirce, Plaintiffs in Error, v. David P. Jones and Forest Ackman, as individuals and as Executors and Trustees of the Last Will and Testament of George W. Jones, deceased, Defendants in Error.

David P. Jones and Forest Ackman, Executors and Trustees of the Last Will and Testament of George W. Jones, deceased, Cross-Complainants in Error, v. Herman Stroops, G. Edwin Jones and Ura G. Jones, Cross-Defendants in Error.

285 I.A. 602

Error to Circuit Court Schuyler County.

JANUARY TERM, A. D. 1936.

Gen. No. 8929 **Agenda No. 3**

MR. JUSTICE FULTON delivered the opinion of the Court.

On May 17th, 1934, Herman Stroops, Plaintiff in Error, filed a suit in assumpsit in the Circuit Court of Schuyler County against the Defendants in Error David P. Jones and Forest E. Ackman, as individuals and as Executors and Trustees of the Last Will and Testament of George W. Jones, deceased, to recover a legacy of $1500.00, bequeathed to Plaintiff in Error in the Will of George W. Jones, deceased. There was a clause in said Will providing as follows:

"I give and bequeath to my grandson Herman Stroops the sum of Fifteen Hundred Dollars ($1,500) which sum is to be held by my executors hereinafter named, in trust for said Herman Stroops until he shall arrive at the age of thirty years and said sum is to be kept invested in good interest bearing securities and the interest thereon paid to my said grandson, as collected, the principal to be paid when he arrives at the age of thirty years."

In his complaint Plaintiff in Error charged a demand for payment had been made upon the Executors and their refusal to pay. The Defendants in Error filed an answer admitting the provision for legacy and alleging that on November 14th, 1929, the Plaintiff in Error had duly assigned said legacy to G. Edwin Jones and Ura G. Jones which assignment had been filed for record with the Clerk of the County Court of Schuyler County, wherein, the Administration of the

George W. Jones Estate was pending and further alleging that the said G. Edwin Jones and Ura G. Jones claimed all the moneys to become due and payable under said legacy. Upon motion of Defendants in Error they were permitted to file a Bill of Interpleader providing they deposited with the Clerk of the Court the money in controversy to be held until the final determination of this suit.

The Bill of Interpleader was filed and certified checks in the amount of $1500.00 deposited with the Clerk of the Circuit Court. G. Edwin Jones and Ura G. Jones were made parties to this petition and they filed their answer to the same, in which they set forth the assignment of the legacy made by Plaintiff in Error, to said G. Edwin Jones and Ura G. Jones. At the same time, they filed a petition for change of venue from the presiding Judge. Plaintiff in Error filed an answer to the interpleader and a motion in the nature of a demurrer to the answer of G. Edwin Jones and Ura G. Jones. Also a motion for judgment against the Defendants in Error in the sum of $1500.00 and interest thereon. No action was taken by any Judge on the application for change of venue, the demurrer or motion for judgment. On September 24th, 1934, a stipulation providing for the dismissal of the cause and reciting that the cause of action was satisfied, signed by Herman Stroops, G. Edwin Jones, Ura Jones, David P. Jones and Forest Ackman, was filed in this Court and an order entered by another presiding Judge, dismissing the suit upon the stipulation filed. On October 1st, 1934, Plaintiff in Error filed a motion to set aside the stipulation and all orders entered by the Court dismissing the suit but no action was taken upon said motion. On the same day Chas. M. Peirce filed a motion to have fees fixed in his behalf as Attorney for Plaintiff in Error, which motion was never acted upon by the Court. On December 3rd, 1934, the same attorney filed a petition asking to have attorney's lien established and also an application for change of venue against the presiding Judge. On January 7th, 1935, Defendants in Error filed a petition asking for leave to withdraw the certified checks theretofore deposited with the Clerk and Chas. M. Peirce filed another petition to adjudicate attorney's lien. These two petitions were consolidated, hearings had and evidence introduced, before another Judge.

On February 5th, 1935, Plaintiff in Error filed a motion to vacate the order of September 24th, 1934,

which dismissed the suit. The said motion, together with the two petitions consolidated as aforesaid, were taken under advisement by the Court and judgment orders entered on April 16th, 1935. The Court found and ordered that Chas. M. Peirce have and recover from G. Edwin Jones and Ura G. Jones the sum of $250.00 as and for his attorney's fees and also that the certified checks for $1500.00 remain in the hands of the Clerk until the motion of February 5th, 1935 be determined. On the same day the Court overruled and denied the motion of February 5th, 1935, to vacate the order entered September 24th, 1934. On May 21st, 1935, the judgment entered April 16th, 1935, was amended to provide that said judgment be a lien against the funds paid the Clerk of this Court until said judgment was paid. Appeal has been taken to this Court from the judgment order of April 16th, 1935 and raising the propriety of the Court in dismissing the suit on September 24th, 1934.

The Plaintiffs in Error first complain that Judge Guy R. Williams was without authority to enter any orders in the cause without an order for a statutory change of venue having been made. The record does not show that this question was in any manner preserved, but in any event no objection was made to the presiding Judge who heard and determined the cause, and even though no formal order was entered providing for a change of venue any Judge of that circuit was fully authorized to hear and enter orders in the case. There is no merit to the contention of the Plaintiffs in Error that Judge Williams had no right to assume jurisdiction in this cause. Counsel for Plaintiffs in Error devotes most of his brief in urging that the legacy to Herman Stroops constituted a Spendthrift Trust and that the assignment of such legacy made by Herman Stroops to G. Edwin Jones and Ura G. Jones prior to his arriving at the age of thirty years was void and of no force and effect, but this question does not seem to be an issue in the cause. This is not a bill to construe a will and no order entered by the Court passed upon this question. The suit was dismissed by Judge A. Clay Williams on September 24th, 1934 upon a written stipulation, signed by the Plaintiff in Error, Stroops and the other parties to the cause. Hence, the question argued by counsel for Plaintiffs in Error with reference to the validity of the assignment are not in any way involved in this appeal.

It was further contended by Plaintiffs in Error that the Court erred in not granting the motion entered February 5th, 1935, in which it was sought to vacate the order of dismissal under date of September 24th, 1934. In support of this motion Plaintiffs in Error attached an affidavit of Herman Stroops setting forth that he did not authorize any person to dismiss said cause; that the dismissal was entered without the knowledge or consent of his counsel; that if anything was signed by him used for purpose of having said cause dismissed, the same was obtained without his knowledge or consent and that any such document was obtained from him by false representations and any acts thereunder were not authorized by him, etc. There was filed by the Executors an answer setting forth the agreement signed by Herman Stroops and acknowledged by him before a Notary Public on September 22nd, 1934. The motion and affidavit of Plaintiffs in Error and the answer of the Executors constituted the pleadings for a hearing on said motion. Testimony was taken in behalf of all the parties and it became necessary for the Court to determine a question of fact as to whether or not the cause set up in said motion and affidavit were true. The Court found adversely to Plaintiffs in Error but the transcript of such testimony has not been preserved nor included in the report of trial proceedings. There is nothing now before this Court upon which it could determine the question of whether or not the Court correctly denied the motion of Plaintiffs in Error. If Plaintiffs in Error desired to have the question passed upon by this Court it was necessary to include in the report of trial proceedings a transcript of the evidence. A client has a right to dismiss a suit without the knowledge or consent of his attorney in the absence of any assignment to the attorney of an interest in the suit; and such dismissal cannot be set aside, in absence of proof that the Clients consent to it was fraudulently obtained. *Cameron et al* v. *Boeger, et al* 200 Ill. 84.

It is apparent that the questions which Plaintiffs in Error argues in chief are questions of fact upon which no testimony is presented to this Court and questions of law which were not issues in any of the orders of the Court appealed from and therefore no grounds upon which this Court could order a reversal.

Plaintiffs in Error have overlooked or disregarded Rule 9 of this Court, as amended, which is identical

with Rule 39 of the Supreme Court, as amended, providing for the preparation and arrangement of briefs, which rule reads as follows:

"The concluding subdivision of the statement of the case should be a brief statement of the errors or cross errors relied upon for a reversal or of the cross errors submitted by an Appellee not prosecuting a cross appeal."

The present rules governing the assignment of errors have merely changed the place where the same shall be set out. Instead of being attached to the record and printed in the abstract, such errors as are relied upon for reversal by the Appellant are now to be set out at the conclusion of Appellants statement of the case, in his brief. *Farmers State Bank* v. *Meyers,* 282 App. 549. Plaintiffs in Error have also disregarded the instructions of Rule 9 providing for the arrangement of the brief. In substance that rule provides that the brief of Appellant shall contain a short and clear statement of the case showing the nature of the action, the nature of the pleading sufficiently to show what the issues were and the questions subject to review arising on the pleadings; in cases depending upon the evidence the leading facts which the evidence prove or tended to prove, how the issues were decided upon the trial and what the judgment or decree was. Then a statement of the errors relied upon for reversal. The statement of the case shall be followed by the propositions of law and the authorities relied upon to support them. The brief may be followed by arguments in support thereof. Plaintiffs in Error have entirely disregarded this rule in the preparation of their briefs but there being no motion to strike nor to dismiss appeal we have considered the case upon its merits.

The judgment of the trial Court is affirmed.

Affirmed.

(Six pages in original opinion.)

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Opinion filed April 17, 1936
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PUBLISHED IN ABSTRACT

Paul J. Melahn, Appellant, v. Charles Mayhew, Appellee.

Appeal from Circuit Court, Champaign County.

JANUARY TERM, A. D. 1936.

285 I.A. 602

Gen. No. 8951 **Agenda No. 9**

MR. JUSTICE FULTON delivered the opinion of the Court.

Around 1:30 A. M. on the morning of August 15th, 1934, Appellant, Paul J. Melahn, was driving alone, North on State Route 25, in a Chevrolet four door passenger car, south of Tolono in Champaign County. At the same time Charles Mayhew, Appellee, and his sixteen year old daughter, Martha, were driving south on this same highway in a V-8 Ford truck with the regulation Ford body. A collision occurred wherein Appellant lost his left arm between the elbow and shoulder; his car was badly damaged and turned upside down off the west side of the pavement.

A suit for damages was filed by Appellant in the Circuit Court of Champaign County. The complaint consisted of two counts, the first count charging general negligence on the part of Appellee and the second count charging a violation of Par. 2 of Sec. 161 of Chap. 121 of the Revised Statutes of Illinois in failing to keep to the right of the center line of the paved portion of the highway. The Appellee answered the complaint, admitting all the averments of both counts, except the charges of due care, negligence and the damages. The case was tried before a jury, who found the Appellee not guilty. A motion for new trial was overruled and judgment entered upon the verdict of the jury, from which judgment this appeal was prosecuted.

There is no serious controversy as to the main facts but a vast difference in the conclusions arrived at by counsel for the parties. There were only three witnesses to the collision, the Appellant, the Appellee and the Appellee's daughter. The Appellant testifies that he was a resident of Champaign and on the 14th of August, 1934, at about 1:50 a. m. he was driving his car north on Route 25, at a rate of from forty to forty-five miles per hour; that the road was perfectly straight at and about where the collision occurred; that he was

driving in his own lane on the highway and never approached closer to the black center line than a foot or a foot and a half; that he saw the two headlights of Appellees truck coming toward him from the north; that from the position of the headlights he would say that Appellees truck was on its own side of the pavement; that the first thing he noticed about the collision was the crash and his car turned over; that at the moment of the crash he was looking straight ahead of him and thinks his car was struck about four or five inches back of the front door; that his car turned over once on the pavement and rolled over again and was facing south when it finally stopped; that he lost his arm in the accident; that when he got out of his car he looked south down the road and saw Appellee's truck standing there; that he walked down the highway and yelled at the man in the truck asking him to get a rope and tie up his arm before he bled to death; that Appellee flagged down an approaching vehicle which picked up Appellant and took him to the Burnham Hospital in Champaign. Appellant also testified that both his hands and arm were inside the car at the time of the collision, although both front windows to the car were open.

The Appellee, corroborated by his daughter, testified that he lived at Mattoon and was engaged in the general trucking business; that on the night in question he saw Appellant's car coming from the south about a thousand feet away; that as the Melahn car came nearer he noticed that it was coming fast and driving close to the black line in the center of the pavement; that he pulled his truck to the west edge of the highway so that the east side of the body of his truck was at least two feet west of the black center line and that this was the position of his car at the time of the collision; that his truck was traveling between twenty and twenty-five miles an hour at and prior to the time of the collision and at the time of the collision and at all times prior thereto was on the west side of the black line of the pavement.

From the testimony of both parties it would appear that at the time the front ends of the two cars passed each other each was apparently on its own side of the black line but that the crash occurred before the two cars had completed passing each other. There is no oral testimony explaining just how the collision occurred. The Appellant introduced in evidence a photograph showing the condition of his car after the acci-

dent; He insists that from this photograph the physical facts conclusively show that the front corner of the bed of Appellees truck gouged into the side of Appellant's car at the left front door tearing off Appellant's arm and seriously damaging the rear end of his car. An examination of the photograph discloses a situation about which reasonable minds might disagree as to just how the accident happened. Opposed to these physical facts is the positive testimony of the Appellee and his daughter that the truck in which they were riding was at all times to the west of the center black line of the highway.

The Appellant urges that the only issue in dispute in this case is as to whether the Appellee negligently permitted his eight foot wide truck to go over the black line and to gouge into Appellant's car, and because of the physical facts, shown in the photograph in evidence, the verdict of the jury was contrary to the manifest weight of the evidence.

In our view of the case there were facts in evidence as above shown upon which there could be an honest difference of opinion, and where the evidence is conflicting it is the sole and exclusive privilege of the jury to determine those facts and the verdict of the jury will not be set aside by a Court unless it is clearly and manifestly against the weight of the evidence. *Mugaviro, Admr.* v. *C. B. & Q. R. R. Co.,* 239 App. 544. If the evidence of the successful party, when considered by itself, is sufficient to sustain the verdict a Court will not set aside the judgment unless it is satisfied that it is manifestly against the weight of the evidence. *Grosch* v. *Mendota National Bank,* 239 App. 515. In this case we do not feel warranted in disturbing the finding of the jury on this question of fact.

The Appellant further complains that it was error for the Court to permit the Appellee and his witnesses to testify to what the Appellee did and said after he had left the scene of the accident. This testimony was admitted to meet the inferences contained in the Appellant's evidence that the Appellee was trying to run away from the scene of the collision. In criminal cases it has always been the law of Illinois that while the flight of the defendant from the scene of the crime, if unexplained, may be shown by the People as a circumstance tending to prove guilt, and defendant should be permitted to show any circumstances tending to explain or excuse his flight. *People* v. *Rappaport* 362 Ill. 462. Ordinarily, in civil cases it is not proper

to admit any self-serving acts or statements occurring after the collision except such as are part of the res gestae and it is possible in this case more evidence than was necessary to meet the inferences of Appellant was permitted, still the testimony could not be construed to be so prejudical as to warrant a reversal of this case.

Appellant also insists that the Court permitted the counsel for Appellee, on cross-examination, to ask questions tending to degrade the Appellant and prejudicial in character. On his direct examination, Appellant had testified that for eight or nine years he had been in the book making business up until about four months before the trial and that at the time of the trial he was not doing anything. Because of the inference to be derived from this testimony that Appellant had not been able to attend to his business because of the loss of his arm in the collision Appellee cross examined, at first without objection, on the Appellant's connection with the book making business, and sought to show that Appellant's place of business had been closed by the authorities of the City of Champaign as a gambling establishment. Upon the sustaining of an objection to this line of testimony the counsel for Appellee asked two more questions as follows:

"Q. You knew about them notifying them to quit?"

"Q. Didn't the city forbid you to start business there again?"

The Court sustained objections to both of these questions. Again in cross-examination the counsel for Appellee asked the following question:

"Q. You did have a bottle of alcohol in that car, at the time of the collision or a bottle of liquor?"

The Court sustained objection to this question and immediately thereafter counsel asked the following:

"Q. There was a bottle of liquor in your car that was only partially filled with intoxicating liquor at the time that this collision occurred, was there not?"

The Appellee defended his position in asking the first two questions on the ground that it was revelant and proper to go into the fact that the occupation of Appellant was unlawful and in light of all of the examination of the Appellant we do not consider the questions asked as to be so prejudicial as to be substantial error. On direct examination Appellant had been asked by his counsel as to whether or not he had any intoxicating liquor to drink on the night in question before leaving Mattoon and under those circumstances it was

proper for the Appellee to cross-examine the witness as to any information concerning the good faith of Appellant's testimony.

Upon the trial there were a large number of witnesses called to testify as to incidental facts concerning the condition of and the markings on the cars, the injuries of the Appellant and other matters not seriously in controversy but on the whole we believe both Appellant and the Appellee were given a fair trial by the Court and the jury. There appearing to be no substantial error in the record the judgment of the trial Court is affirmed.

Affirmed.

(Six pages in original opinion)

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

Term No 16

Agenda 4.
February Term, 1936.

Arthur F. McClain, Appellant, vs. Brotherhood of Railroad Trainmen, Appellee.	Appeal from City Court of East St. Louis.

285 I.A. 602-3

EDWARDS, P. J.

On December 28, 1932, appellant was a member of the Brotherhood of Railroad Trainmen and affiliated with Dupo Lodge No. 378. He at the time was the holder of a Class C benefit certificate for $1,875. On the aforesaid date he surrendered the certificate for cancellation and requested that a certificate of Class A, in the sum of $700, be issued to him, and such certificate was thereafter, on April 14, 1933, issued and delivered to him. In the meantime, on January 31, 1933, he, while employed in the railway service, was injured severely and confined in the hospital for a long period. In April, 1933, he submitted to the Order his petition for the allowance of a benevolent claim. The local lodge approved the claim, which was then considered and rejected by the Grand Lodge, and appellant was so advised by letter of such action, which occurred on July 6, 1933.

Section 131 of the constitution and laws of the Brotherhood provided that when a member in good standing became sick or disabled and had a claim pending for total and permanent disability, or a benevolent claim, that the local lodge should pay his dues until the claim had been passed upon, pro-

vided he made a written request therefor. It appears that appellant did not so request; however, the local lodge, apparently of its own motion, did pay such dues up until and including August 1, 1933.

The treasurer of the local lodge wrote appellant on August 30, 1933, that his claim had been disallowed and that the lodge was not obliged to pay his dues after August 1; also, that if he did not pay his September dues he would be expelled, and suggesting that he transfer to the Individual Reserve Department, an insurance branch of the Order, calling attention to such benefits as the writer was of opinion that appellant would thereby derive.

The latter received the letter on the same day, and at once replied, stating that he was aware of the rejection of his claim, but contended that it was to be reconsidered, and in effect declining to accept the proposition suggested. On September 4, 1933, the treasurer again wrote appellant, saying that if he did not act upon the proposition he would be expelled, and the latter responded on September 9, 1933, and again refused to pay the September dues. He then, on September 12, 1933, wrote a letter of inquiry to the treasurer asking what action the lodge had taken, which was answered by the latter's letter of September 16, 1933, advising appellant that he had been expelled, and that he was then indebted to the local lodge in the sum of $53.60.

Appellant thereupon brought suit and the cause was heard before a jury. At the close of all the evidence appellee moved for a directed verdict, the court reserved ruling thereon under Section 68 of the Civil Practice Act, and the jury found for appellant in the amount of $1,500. Appellee moved for judgment notwithstanding the verdict; the court sustained the motion, entered judgment for appellee, and this appeal is prosecuted from such order.

The only question argued by either side is whether the local lodge rightfully expelled appellant.

Section 131 of the general rules of the Brotherhood provided that if a member in good standing became sick or disabled, the local lodge should pay his dues for such time as the lodge should determine, provided such member notified the treasurer of his lodge in writing of such fact, and in case of total and permanent disability, or of claims addressed to the benevolence of the Order, if the member made claim therefor, the lodge should pay his dues "until his claim has been passed on by the General Secretary and Treasurer, but not afterwards."

Section 129 was to the effect that membership dues should be paid monthly in advance before the first day of each month.

Expulsion of members was provided for in Section 141, as follows: "Any member of this lodge failing or refusing to pay his dues and assessments, as required by Section 129, becomes expelled without any notice or further action whatsoever *****." And it further reads: "If a lodge advances a member money for the payment of dues he shall be required to repay the same within the time set by the lodge for such payment, or shall become expelled as for non-payment of dues. The minutes of the lodge should show the time set for the repayment of the money so advanced for this purpose."

That the terms of this section, providing that a member failing to pay his dues shall be expelled without any notice thereof, is a reasonable and valid regulation, has been held in The People ex rel. v. Board of Trade, 224 Ill., 370; Champion v. Hannahan, 138 Ill. App., 387.

By the terms of said Section 131 the local lodge was only authorized to pay the dues of appellant until his claim was disallowed on July 6; hence when it advanced the requisite amount for him on August 1 it was exceeding its authority. He was notified of the Grand Lodge's action rejecting his claim, and was charged with knowledge that the general rules required that thereafter he pay his dues or be subject to expulsion. It was not necessary

that the local lodge notify him that it would no longer make advancements for him, as it (the local lodge) was without authority to so act after receiving notice of the rejection of his claim.

Appellant contends that it was incumbent upon the local lodge to fix a time in which a pellant should repay the amounts which it had advanced for him, before declaring him expelled. If the expulsion had been for such reason, the contention would be sound, but it is obvious that he was expelled for failure to pay his dues September 1, as the rules required him to do, after the rejection of his claim, of which he was aware, and not because he did not repay the amount of the dues which the lodge had advanced for him.

Section 141 provided for two grounds of expulsion; one, failure to pay dues, and the other failure to repay dues advanced, within the time fixed by the local lodge for such repayment. The local lodge did not attempt to collect what it had advanced for appellant, nor ask for its repayment; it did notify him to pay his September dues, as the rules obligated him to do, or he would be expelled. His claim had been rejected; the lodge could not longer advance his dues, and if he wished to remain in the Order thereafter it was incumbent upon him to pay the required dues. He failed to do so, and in conformity with the constitution and rules of the Brotherhood was expelled. The local lodge was right in its act of expulsion.

We think the judgment is justified by the record, and it will be affirmed.

Judgment affirmed.

Not to be published in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Term No. 11 | Agenda No. 12

THE W. Q. O'NEALL COMPANY,
a Corporation,
Plaintiff and Appellee,

vs.

COMMISSIONER OF HIGHWAYS,
TOWN OF DENNING, FRANKLIN
COUNTY, ILLINOIS,
Defendant and Appellant.

285 I A. 602

APPEAL FROM THE
CIRCUIT COURT OF
FRANKLIN COUNTY,
ILLINOIS.

Murphy, J:

In April, 1934, plaintiff-appellee instituted its suit against the defendant-appellant to recover on a tax warrant issued by the commissioner of highways of the Town of Denning, Franklin County.

The first amended complaint upon which issue was joined alleged that the defendant did on October 23, 1931, issue and deliver to plaintiff an interest bearing tax warrant for $255.05; that it was issued in payment of an original order for material for maintenance of the highways of said township; that said material was purchased on the written order of the highway commissioner of the township and with the written consent of the county superintendent of highways of Franklin County; that said material was delivered to and accepted by the highway commissioner of said township and used in the maintenance of its roads; that the original warrant had been lost and plaintiff was unable to furnish copy of the same and prayed for judgment for the amount of the warrant with interest. The amended complaint was sworn to and defendant filed a verified answer. The cause was tried before the court without a jury.

The facts as shown by the evidence are that on March 23, 1929, defendant purchased from plaintiff certain road materials at a total cost price of $435.80; that a tax warrant was issued for the full amount. On September 10, 1930, defendant paid $200.00 on the warrant and another warrant was issued for the unpaid balance. This latter warrant was taken up on October 23, 1931, by the issuance of the warrant declared upon in this suit. The amount of the warrant was $255.05, being the unpaid balance plus accumulated interest.

At the conclusion of the evidence and before the case was submitted on oral argument, plaintiff filed its second amended complaint in which it was alleged that on March 23, 1929, plaintiff sold and delivered to the defendant at his instance and request certain goods and merchandise of a reasonable value of $435.80, that $200.00 had been paid and prayed for judgment for $235.80. Defendant answered denying the purchase of the merchandise, alleging payment and pleaded that the cause of action alleged in the second amended complaint was a different cause of action than the one declared upon in the first amended complaint and was therefore barred by the five year statute of limitation as it applies to open accounts. Plaintiff did not amend its second amended complaint and made no reply to defendant's limitation defense. No further evidence was introduced after the filing of the second amended complaint. Judgment was entered for plaintiff for $235.80 for goods, wares and merchandise sold.

The second amended complaint filed October 11, 1935, alleged the merchandise was purchased on open account March 23, 1929, that there was a payment of $200.00, the date of which is not stated in the pleading. The evidence introduced under the first amended complaint showed the payment to have been made September 10,

1930. On the face of the second amended complaint and by the evidence, the cause of action declared upon was barred by limitation.

Plaintiff contends that under Paragraph One, Section 46 of the Civil Practise Act, Ill. State Bar Stats., 1935, it had the right to amend its pleadings any time before final judgment, changing the cause of action or adding new causes of action for which it intended to recover. Paragraph Two of said Section 46, deals with the amendment of pleadings where the statute of limitations has been pleaded as a bar to the cause of action alleged in the amended pleading, as in this case. It is therein provided that the cause of action set up in any amended pleading shall not be barred by lapse of time, under any statute limiting the time within which such action might be brought if such time had not expired when the original pleading was filed; if it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurence set up in the original pleading, then, if such is shown, in order to preserve the cause of action stated in the amended pleading, and for such purpose only, the amendment shall be held to relate back to the date of the filing of the original pleading.

There is no allegation of fact in either the first or second amended complaints that in any way identifies the issuance of the warrant on October 23, 1931, with the sale of the goods on March 23, 1929, as arising out of the same transaction or occurence. It is true the evidence shows the warrant was a renewal of a series of warrants running back to the warrant issued for the merchandise sold March 23, 1929. Whether such facts, if properly pleaded, would be sufficient to be considered as arising out of the same transaction or occurence, we do not decide, for the statute provides that such facts shall be shown by the original and amended pleadings.

Since the original and amended pleadings do not allege facts showing the causes of action declared upon in the second amended complaint to have arisen out of the same transaction or occurence as the cause of action stated in the first amended complaint, it cannot be held that the cause of action stated in the second amended complaint relates back to the date of the filing of the first amended complaint. The cause of action stated in the second amended complaint was barred by the five year statute of limitation and it is not necessary to consider other errors assigned.

Judgment of the lower court is reversed.

Judgment reversed.

Not to be published in full.

STATE OF ILLINOIS

FOURTH DISTRICT

APPELLATE COURT

FEBRUARY TERM, A. D. 1936.

TERM NO. 10 AGENDA NO. 11.

MELBA KREITNER, Plaintiff--Appellee, vs. EUGENE W. KREITNER, Defendant--Appellant.	Appeal from the City Court of the City of East St. Louis, St. Clair County, Illinois.

285 I.A. 602

STONE, J:

Plaintiff-appellee filed her complaint for divorce against defendant-appellant to the January Term of the City Court of East St. Louis, Illinois, on the 24th day of February, A. D. 1933, charging defendant-appellant with extreme and repeated cruelty, and prayed for the care, custody and control of their children, Dorothy Jeanne Kreitner, then of the age of 16, and Charles C. Kreitner, then of the age of 14 years (Record pp. 1-3). Defendant-appellant filed his entry of appearance and answer denying the charges of cruelty contained in the bill of complaint (Recordpp. 4-5). Hearing was had on bill and answer and the Court decreed a divorce to the complainant-appellee, and gave the care, custody, control and education of the said children to the complainant-appellee, as had been previously agreed to between the parties. The Court further found that the property settlement theretofore made between the parties was just and equitable, and confirmed, ratified and approved the same and found and decreed that said settlement was in full of all alimony rights and support of the complainant-appellee.

The Court further decreed that the defendant-appellant pay to the complainant-appellee for the support of said children an amount "commensurate with his earning ability and his financial condition" (Record pp. 6-9).

On May 16, 1935, upon petition of complainant-appellee, the Court modified the original decree as follows:

> "That the defendant, Eugene M. Kreitner, pay to the plaintiff, Melba Kreitner, the sum of $100.00 per month, the first payment to be made on the 1st day of June, 1935, and said payments to be made each month thereafter until the further order of this Court, <u>said sum to be for the support and maintenance of the TWO CHILDREN of the parties</u>. (Record p. 10).

The modified decree, by agreement of parties, was refiled as of the 3rd day of September, 1935 (Record pp. 17-18, minutes of Court), and upon such refiling defendant-appellant filed his notice of appeal praying for reversal of the modified decree and for reason of such reversal sets forth that Dorothy Jeanne Kreitner, one of the children of said parties, was an adult at the time the modified decree was entered; that defendant-appellant is not liable for her support, and further asking for a reversal on account of the indefinite order contained in the modified decree as to the amount of the allowance of Charles G. Kreitner, the minor child of the parties (Record p. 11).

It was stipulated by the parties that Dorothy Kreitner was of the age of 18 years on the 11th day of June, A. D. 1934, and is mentally and physically sound and healthy, is well educated, and is a stenographer by profession, but not regularly employed, and that Charles was of the age of 16 on the 29th day of February, A. D. 1935, and is now attending his third year in high school and is strong, healthy and mentally sound (Record p. 23).

Appellant has appealed to this Court and has assigned the following errors:

1. The Court erred in compelling defendant-appellant to pay for the support, maintenance and education of his adult child.
2. The Court erred in failing to fix with definiteness and certainty the amount the defendant-appellant should pay for the support, maintenance and education of his minor child.
3. The modified decree is contrary to law.
4. The modified decree is contrary to the facts stipulated between the parties.

Appellant has not complied with the practice act because he has not preserved the proceeding on the trial. However, the stipulation of the parties presents a question on the record as it is which the court should consider.

The modified decree provides and orders appellant to pay for the support of his child which has reached her majority and according to the stipulation is capable in all ways of supporting herself. This the Court could not lawfully do. Sayles v. Christie 187 Ill. 420; 46 Corpus Juris 1269; Mercer v. Rosinberry 88 Ill. App. 623. This case is not like Freestate v. Freestate 244 Ill. App. 160. There the daughter in question was an invalid and the Court held that upon a proper showing the Court might compel an increased maintenance. The modified decree requires appellant to pay $100.00 per month for the support and maintenance of the two children of the parties. One of these children is an adult and the Court under her circumstances could not compel appellant to support her. Part of the modification being without the power of the Court, it leaves indefinite and uncertain how much appellant should pay for the support of the other child which is a minor. This condition works an injustice to appellant who cannot tell how much he is lawfully bound to pay and an injustice to the minor child who cannot tell how much he is to have. This condition should not obtain but should be made definite and certain.

The modified decree in so far as it relates to the payment of support money is reversed and remanded to the City Court of East St. Louis, with direction to take further proceeding in the cause in harmony with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

not to be published in full.

IN THE

APPELLATE COURT

OF THE

STATE OF ILLINOIS

Fourth District

Term No 12

Agenda No. 14

FRANK C. TOOMBS, an individual doing business under the firm name and style of Frank C. Toombs & Company, Appellee	Assumpsit
vs.	Appeal from the Circuit Court of Lawrence County.
JAMES LEWIS, Appellant.	285 I.A. 603

Stone, J.

This cause came before us on a former hearing and our decision therein appears in TOOMBS v. LEWIS, 277 Ill. App. 84. We there reversed the judgment of the trial court without remanding, upon the theory that the conduct of the plaintiff gave the defendant the right to treat the transaction as a bargain and sale, and that the plaintiff had not shown the necessary freedom from negligence and good faith to enable him to recover on the theory of mutual mistake. On appeal from that judgment the Supreme Court of Illinois held that the conduct of the plaintiff did not as a matter of fact or law change the relation of principal and agent to that of seller and buyer. The court held that there was evidence from which the jury could find that the plaintiff was the defendant's agent and that there was evidence from which the jury could find that the plaintiff had maintained his cause of action. The judgment of this court was reversed and the cause remanded with directions to consider other errors.

Our attention is called to a statement of the plaintiff, on cross examination that he had assigned his cause of action. No further detail concerning the time or

IN THE

APPELLATE COURT

OF THE

STATE OF ILLINOIS

Fourth District

FRANK C. TOOMBS, an individual doing business under the firm name and style of Frank C. Toombs & Company, Appellee, vs. JAMES LEWIS, Appellant.	Assumpsit. Appeal from the Circuit Court of Lawrence County.

285 I.A. 603

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Our attention is called to a statement of the plaintiff, on cross examination [illegible] of action. No further detail concerning the time or

manner of the supposed assignment is given. It does not appear that this matter was urged in the trial court. We are of the opinion that the matter was waived.

If there was in fact an assignment which occurred after the commencement of proceedings in this suit, then, if justice requires, any action necessary may be taken under Section 54 of the Civil Practice Act. (Cahill, Illinois State Bar Association Statutes (1935), Chapter 110, Paragraph 182.) In any event, as this cause must be reversed for other reasons assigned herein, we think that the disposition of this matter, and the admission of evidence with respect thereto, at this stage of the proceedings, are best left to the sound discretion of the trial court.

Appellee contends that the court erred in giving an instruction which allowed the plaintiff to recover if the evidence preponderated "although but slightly" in his favor. This instruction was approved by the earlier decisions of our courts: HANCHETT v. HAAS, 219 Ill. 546, on page 548; CHICAGO CITY RY. v. BUNDY, 210 Ill. 39, on 48; DONLEY v. DAUGHERTY, 174 Ill. 582. More recently it has been severely criticized: MALLOY v. CHICAGO RAPID TRANSIT CO., 335 Ill. 164; BUNCH v. ABBOTT, 256 Ill. App. 33. In both of the latter cases there were other and more serious errors requiring reversal. The instruction is also incorrect in authorizing a recovery if the plaintiff proves his case by a preponderance of the evidence, without confining the plaintiff's case to the declaration. MALLOY v. CHICAGO RAPID TRANSIT CO., 335 Ill. 164, on171. The error is no doubt less serious in a case where, as here, the declaration is upon the common counts. While the instruction taken as a whole is improper, and should not have been given, it is not necessary for us to hold whether standing alone it would have constitutud reversible error.

A further error is urged in the giving of plaintiff's given instructions I, II, and IV. Each of these instruc-

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A further error is urged in the giving of plaintiff's given instructions I, II, and IV. Each of these instruc-

tions directs a verdict if certain facts are found from the evidence. Each of these instructions is based upon the theory of a contract for sale between the parties. Each of the instructions ignores the defense that the plaintiff had an opportunity to inspect the articles, and, having failed to do so, the mistake occurred through the fault of the plaintiff. In STEINMEYER v. SCHROEPPEL, 286 Ill. 9, on 13, the Supreme Court of Illinois clearly stated the requirements for recovery in case of mutual mistake of fact in the formation of a contract. Freedom from negligence on the part of the one seeking recovery is an essential element. Instructions which ignore defenses, which the evidence fairly tends to prove, constitute reversible error: GORRELL v. PAYSON, 170 Ill. 213, 217 to 219; NYMAN v. MANUFACTURERS and MERCHANTS LIFE ASSOCIATION, 262 Ill. 300, on 308, and the giving of such instructions is not cured by other instructions given. I. C. R. R. CO. v. SMITH, 208 Ill. 608, on 619.

The only question remaining is whether the evidence fairly tended to support this defense. We do not understand that the Supreme Court held that there was no evidence to support the theory of purchase and sale. The decision as we understand it is simply that there was evidence to support the theory of agency and that, that theory of the case was properly submitted to the jury.

We understand the holding of the Supreme Court to be that if the relationship of seller and purchaser did not otherwise exist, but that of principal and agent did, the formal wording of the confirmation, and the retention by the plaintiff of the difference between $38.00 and $38.50 a share upon the sale of the allotment certificates, would not necessarily, as a fact or under a rule of law convert the relationship of principal and agent into one of seller and purchaser. The above instructions were given on the theory of purchase and sale. It appears from defendant's refused instructions I and II that the defense of failure to use the opportunity to examine, was urged. The evidence shows

tions directs a verdict if certain facts are found from the evidence. Each of these instructions is based upon the theory of a contract for sale between the parties. Each of the instructions ignores the defense that the plaintiff had an opportunity to inspect the articles, and, having failed to do so, the mistake occurred through the fault of the plaintiff. In STEINMEYER v. SCHROEPPEL, 288 Ill. 9, on 13, the Supreme Court of Illinois clearly states the requirements for recovery in case of mutual mistake of fact in the formation of a contract. Freedom from negligence on the part of the one seeking recovery is an essential element. Instructions which ignore defenses, which the evidence fairly tends to prove, constitute reversible error: GORRELL v. PAYSON, 177 Ill. 215, 217 to 219; NYMAN v. MANUFACTURERS and MERCHANTS LIFE ASSOCIATION, 288 Ill. 300, on 308, and the giving of such instructions is not cured by other instructions given. I. C. R. R. CO. v. SMITH, 208 Ill. 608, on 618.

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We understand the holding of the Supreme Court to be that if the relationship of seller and purchaser did not otherwise exist, but that of principal and agent did, the formal wording of the confirmation, and the restitution by the plaintiff of the difference between $58.00 and $58.50 a share upon the sale of the allotment certificates, would not necessarily, as a fact or under a rule of law convert the relationship of principal and agent into one of seller and purchaser. The above instructions were given on the theory of purchase and sale. It appears from defendant's refused instructions I and II that the defense of failure to use the opportunity to examine, was urged. The evidence shows

that the allotment certificate of the defendant was forwarded to the plaintiff with a draft attached and that the plaintiff's secretary received the certificate.

If the jury were entitled to consider whether the transaction amounted to a purchase by the plaintiff, the jury should also have been allowed to consider, under proper instructions, whether the plaintiff was free from negligence in the consummation of the purchase.

We are of the opinion that this theory of defense was not properly presented to the jury, and that the judgment of the Circuit Court of Lawrence County should be reversed and the cause remanded for a new trial.

Reversed and remanded.

Not to be published in full.

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